

1 IN THE DISTRICT COURT OF THE UNITED STATES
2 FOR THE NORTHERN DISTRICT OF OHIO
3 EASTERN DIVISION
4 JOCELYN TOMPKIN, ETC., ET AL.,)
5) Plaintiffs,) Judge David D. Dowd, Jr.
6)) Akron, Ohio
7) vs.) Civil Action
8) AMERICAN BRANDS, INC., ET AL.,) Number 5:94CV1302
9) Defendants.)

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11 TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE
12 THE HONORABLE DAVID D. DOWD, JR.,
13 JUDGE OF SAID COURT, AND A JURY
14 ON THURSDAY, SEPTEMBER 27, 2001.
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25 Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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1 THE COURT: Please be seated.
2 We are still a few jurors short.
3 MR. McLAUGHLIN: Okay. Good morning, Your
4 Honor.
5 THE COURT: Well, I don't know.
6 (Laughter).
7 MR. McLAUGHLIN: It is. It is.
8 Can we see you before we get started?
9 THE COURT: Sure.
10 (Side-bar conference had off the record).
11 (Jury in).
12 THE COURT: Good morning. Please be seated.
13 Members of the jury, the normal routine, of
14 course, is that the plaintiff presents its entire case
15 before the defendants have the opportunity to go forward or
16 the responsibility to go forward.
17 However, today the next witness will be
18 Professor Joan Hoff, H-O-F-F. Professor Hoff is being
19 called by the defendants. Ordinarily Dr. Hoff would
20 testify during defendants' case. However, because of some
21 scheduling difficulties beyond her control, and with the
22 plaintiff's permission, I am permitting her to testify
23 during plaintiff's case in chief.
24 So view this as defense testimony. The
25 plaintiff will have the opportunity to cross-examine this

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1 witness, just as the defendants have had the opportunity to
2 cross-examine the plaintiff's witness.
3 So when she testifies, assume and understand
4 that this is part of the defendants' case. I appreciate
5 the plaintiff agreeing to permitting the defendant to call
6 Dr. Hoff out of order.
7 You may now proceed, please.
8 MR. COFER: Thank you, Your Honor.
9 Mr. Smith, thank you very much for that
10 courtesy. Members of the jury, good morning. Your Honor,
11 good morning.
12 The defense calls Professor Joan Hoff.
13 JOAN HOFF
14 of lawful age, a witness called by the Defendants,

15 being first duly sworn, was examined
16 and testified as follows:
17 DIRECT EXAMINATION OF JOAN HOFF
18 BY MR. COFER:
19 Q. Good morning, Dr. Hoff.
20 A. Good morning.
21 Q. Would you please tell the jury what you do for a
22 living?
23 A. I'm a professor of history at Ohio University in
24 Athens.
25 Q. Could you briefly describe your educational

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Hoff - Direct

1 background since high school?
2 A. I was born and raised in Montana, so I went to the
3 University of Montana for my undergraduate degree. I
4 majored in European history and journalism.
5 Then I went on to Cornell University, majored
6 in Slavic history. And then to the University of
7 California at Berkeley where I majored in U.S. history.
8 Q. And so it's clear for the jury, if I address you as
9 Dr. Hoff, you have a Ph.D.; you are not a medical doctor,
10 correct?
11 A. That's correct.
12 Q. Would you tell the jury what does an historian do?
13 A. Well, what we do very generally speaking is study
14 change over time. And that time period can be a decade, it
15 can be several centuries or more, or it can be a one or two
16 year period.
17 So what we look at is a specific time period
18 and try to see if we can detect changes, either events
19 which change the course of history, or people who may have
20 changed the course of history, or movements which may have
21 changed the course of history in any given time period.
22 We look for change, and basically we are
23 trying to determine whether there was more change at a
24 given time period or more continuity in a given time
25 period.

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Hoff - Direct

1 Q. Professor Hoff, where have you taught history?
2 A. Well, I started as a graduate student, Ph.D. graduate
3 student teaching at the University of California in
4 Berkeley. But then I went on to Sacramento State. I've
5 taught in Arizona Southern, the University of Arizona.
6 I spent most of my time, over 15 years, at
7 the Indiana University in Bloomington. And then I went on
8 to Ohio University. And last year I had a fellowship at
9 the College of William and Mary.
10 Q. Have you published any books or articles in the field
11 of history?
12 A. I've published 13 books on a variety of topics
13 because I specialize in a number of different fields, and
14 around 80 articles.
15 Q. How many of those articles have been published in the
16 peer review literature?
17 A. Most of the articles were reviewed by journals which
18 have other scholars look at them before they are published.
19 And all of the books are subject to peer review.
20 Q. Professor Hoff, have you ever been asked to appear on
21 television to comment on historical issues?
22 A. Well, because of one of my specialties, which is the
23 modern presidency -- I've written on Herbert Hoover,

24 Richard Nixon -- I've appeared quite often in the past, oh,
25 five or eight years, on programs where they need

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Hoff - Direct

1 presidential scholars.

2 So I have been on the PBS News Hour with
3 Lehrer when the first one was McNeil and Lehrer, and now
4 the Lehrer program, and on CNN and on the Fox channel.

5 Q. Have you served as an editor of any professional
6 journals?

7 A. I founded and edited for eight years a -- the Journal
8 of Women's History which is a social and cultural journal
9 devoted to the study of women.

10 But I also edited Presidential Studies
11 Quarterly in a position I had when I headed the center for
12 the study of the presidency in New York City.

13 Q. Professor Hoff, have you received any honors for your
14 work in the field of history?

15 A. Well, like most scholars, we depend on grants and
16 fellowships to finance our research, and probably the most
17 prestigious fellowship you can receive, not only in history
18 but in other disciplines, which is the Guggenheim which I
19 was awarded, but primarily my research and some of my
20 teaching in foreign countries has been sponsored by the
21 Fulbright program.

22 So I have taught and done research in
23 Ireland, Poland, a little bit in Germany, all under the
24 auspices of the Fulbright program.

25 Q. I have in my notes you also served on the Pulitzer

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Hoff - Direct

1 Prize for historical works and also addressed the Nobel
2 Institute, is that correct?

3 A. That's correct.

4 Q. Specifically would you tell the jury what type of an
5 historian are you?

6 A. Because I've specialized in a number of fields, I
7 started out as a -- what I call and which most historians
8 now call -- as a traditional historian.

9 I study politics, I study foreign policy, and
10 that meant in essence that I studied prominent individuals
11 and major events in history.

12 But after I became a full professor and
13 looked at other areas, I became interested in women's
14 history. And in order to study women's history, I had to
15 think about a newly developing field, a subfield really of
16 history which was called the social and cultural history.

17 So in essence, what I've done in the last 25
18 or 30 years is to continue this traditional research, but
19 also pick up with the new social and cultural history
20 because of my interest in the history of women.

21 Q. And tell the jury, if you would, what is social and
22 cultural history?

23 A. Well, unlike -- I think the easiest way to explain it
24 is that unlike traditional history, which studies important
25 people and important events, what social and cultural

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Hoff - Direct

1 history does is to look at how ordinary people live. That
2 is, we try to find out what they wore, sometimes what
3 attitudes they held, what professions or jobs they may have
4 held or engaged in.

5 And so what we are trying to do is

6 understand, as we sometimes say, history from the bottom
7 up; what communities or groups of people did in any time
8 period.
9 We are looking at the lives then of ordinary
10 people collectively rather than looking at the life of a
11 single individual, which traditional historians tend to do.
12 Q. Professor Hoff, what have you been asked to do in
13 this case?
14 A. In this case I had a very specific task which was to
15 look at a particular time period, the period or the years
16 from 1950 to 1964, '65, and to try to determine commonly
17 held attitudes or common knowledge or common information
18 available to the average person about the link between lung
19 cancer and cigarette smoking.
20 Q. Is this a task that is particularly suited for an
21 historian to do?
22 A. For a social and cultural historian, it's a perfect
23 task to take up.
24 Q. Why is that?
25 A. Because again as I said, you are trying to determine

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Hoff - Direct

1 popular or common attitudes, general awareness about a
2 specific subject; in this case, linkage between lung cancer
3 and cigarette smoking.
4 Q. Professor Hoff, when conducting historical research,
5 do you use the historical method?
6 A. Yes, I do, as all professional historians do.
7 Q. And did you use the historical method for the
8 opinions that you have reached and you are going to express
9 in this case today?
10 A. Yes, I did.
11 Q. Do you have a demonstrative that would assist the
12 jury in understanding what the historical method is?
13 A. Yes.
14 MR. COFER: Your Honor, I'm going to use a
15 number of demonstratives with the Court's permission.
16 Would you mind if I asked Mr. Proctor to
17 stand there and put them up for me?
18 THE COURT: You may proceed.
19 MR. COFER: Thank you very much. If you
20 would put the first one up, please, Mr. Proctor.
21 BY MR. COFER:
22 Q. I want to make sure you can see and they can see it.
23 A. I can see it.
24 THE COURT: Don't worry about me. Make sure
25 the witness can see it.

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Hoff - Direct

1 MR. COFER: Can everyone see this?
2 THE COURT: I can see it. I can see it.
3 BY MR. COFER:
4 Q. All right. An historical method.
5 What is the first thing a historian does when
6 using the historical method?
7 A. Well, it's obvious to us, but it may not be obvious
8 to a general audience, that the very first thing you have
9 to do is make sure you are asking an important major
10 question about the subject you've chosen to study.
11 If you ask trivial or questions which are
12 sort of off the mark, you can waste a lot of time in terms
13 of your research, and you may come up with evidence that
14 doesn't really apply to the subject matter in any

15 significant or original way.
16 So you've got to frame these questions, and
17 we teach our graduate students to make sure they are asking
18 the major questions. Sometimes we say it's more important
19 to ask the question than to actually find an answer to it,
20 because it keeps you focused on the subject.
21 Q. And again for this case, what was the specific
22 question that you framed?
23 A. For this time period, from 1950 to '64, it was
24 whether or not there was information in -- available to the
25 average person about the linkage between smoking and lung
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1 cancer.
2 Q. And by this time period, do you mean 1950 to 1964 or
3 '5?
4 A. Yes.
5 Q. And when you say "available to the average person,"
6 do you mean the ordinary person in Ohio?
7 A. I do.
8 Q. As a social and cultural historian, are you familiar
9 with the concept of common knowledge?
10 A. I'm familiar with the term because it's one that we
11 use in that subfield of social and cultural history.
12 Sometimes you'll hear the term "Conventional
13 wisdom" used instead of common knowledge. Sometimes you
14 even hear the term "common sense" used.
15 But by and large, historians have decided
16 that we will use this term "common knowledge."
17 Q. And as a social and cultural historian, what does
18 common knowledge mean?
19 A. Well, the thing to keep in mind about common
20 knowledge is the word "Common," because what it really
21 means is that this is the lowest common denominator of
22 information that a society or a culture conveys to its
23 people.
24 It's the kind of general awareness on a
25 variety of topics that the society puts out there, either
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1 in the form of newspaper articles or other media, or
2 through popular songs or through movies or through a
3 variety of other ways.
4 Every society prepares its people to think in
5 a certain way about a variety of topics.
6 And we begin to acquire common knowledge as
7 children. Usually we do this, we acquire this kind of
8 knowledge from our parents who are concerned about
9 preventing us from harming ourselves as we grow up. So
10 they give us advice about dos and don'ts of things to avoid
11 like playing with matches.
12 And our parents also instill in us certain
13 values, sometimes religious values or political values, but
14 it's this very, very low level general awareness that
15 constitutes the common knowledge or the commonality of
16 knowledge.
17 Q. Professor Hoff, does common knowledge mean the same
18 thing as belief?
19 A. In my opinion it does not, because a belief -- common
20 knowledge is a passive kind of knowledge that comes to you
21 whether you know it or whether you even want to become
22 aware of it. It's something that simply is passed on from
23 generation, and -- as I say, passed on from generation to

24 generation and usually begins to come to us from our
25 parents.

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1 A belief, in my opinion, is something that
2 you hold or come to believe about a subject because you go
3 actively out to seek knowledge on a particular topic. And
4 then you come to hold a belief that you have actively
5 pursued or actively attempted to inform yourself about.

6 And on basis of that belief, very often you
7 might either take action or simply come to hold this belief
8 very strongly.

9 Whereas, it's not a passive type of activity
10 at all in terms of your acquirement of the information.

11 Q. Professor Hoff, is common knowledge necessarily based
12 on scientific fact?

13 A. No, it is not, because as I say, as it's passed on
14 over time, it's accumulative; it goes from generation to
15 generation.

16 Sometimes it's ahead of scientific knowledge,
17 not -- this isn't common, but sometimes it is, and very
18 often it's not based on scientific information at all.

19 Q. Can you think of a couple examples of when common
20 knowledge actually came before or got ahead of scientific
21 fact?

22 A. Well, one of the reasons that tobacco usage in
23 general is of interest to social historians is that it
24 is -- tobacco usage and just tobacco products in general
25 have had a very negative image over time from the beginning

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1 of the, say, the 17th century when it was really first
2 introduced and used in Europe in a widespread way.

3 And so what's interesting about this is that
4 the image of tobacco, the general awareness about tobacco
5 usage was largely negative; that is, the idea was conveyed
6 almost from the beginning that there was something harmful,
7 there were ill health effects associated with tobacco
8 usage.

9 And in this case, it took several centuries
10 before scientific evidence caught up with that kind of
11 common knowledge.

12 Q. But --

13 A. To think about maybe a better example, a more mundane
14 one, is simply the idea we've all held for some time in
15 this country, at least, that chicken soup was good for you
16 if you had a cold and you were sick.

17 Recently scientists have proven, indeed,
18 there is some medicinal benefit from eating chicken soup if
19 you have a cold or the flu.

20 Q. Do people always act on their common knowledge?

21 A. No, that's another interesting thing about the
22 concept. Because this is about general awareness, you may
23 know something that your parents have told you to do or not
24 to do or that you've picked up in school or from other
25 institutions in the society, but because we are human, we

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1 don't always act on the basis of common sense or reason,
2 and we are risk takers.

3 So the answer is no.

4 Q. Is AIDS an example of not acting on common knowledge?

5 A. Well, sadly it's probably one of the best examples

6 now because just last month the "New York Times" carried a
7 series of articles on the gay community in San Francisco.
8 If there's any community that has a general
9 awareness and very specific awareness, in most instances,
10 of the seriousness of having unprotected sex and of the
11 deadly nature of AIDS, it is the gay community. And there
12 is an increase right now in unprotected sex as practiced by
13 gay men in San Francisco.

14 So common knowledge doesn't mean you are
15 going to always act in your best interest.

16 Q. Professor Hoff, the second thing you have on the
17 board in front of the jury, it says "Identify sources and
18 collect information."

19 Could you tell the jury about that, please?

20 A. Again, this is -- it looks simple, but it's a little
21 more complicated than it sounds or looks on the board.

22 There are two types of sources that
23 professional historians use. One type we call primary
24 sources. These are documents that are actually produced in
25 the time period you are studying. So you would go back to

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1 newspapers, say for the 1950s, or if you were studying the
2 19th century, you would look at newspapers and magazines
3 there.

4 When you are looking for documents, these
5 primary documents are produced by people who lived in the
6 period, or by newspapers and magazines, or there could be
7 memoirs or diaries or letters. They are produced in the
8 time period. So they are called primary because of that.

9 We also look at what we call secondary
10 sources. And we usually start with these. These are
11 articles or books written about the time period or the
12 person you want to study or the subject you are studying.

13 So what we teach our graduate students is to
14 first look at the secondary sources to see what's been
15 written. Then to go to these primary sources, one, to see
16 if the secondary sources are true, if -- and the other
17 thing is to come up with maybe an original interpretation
18 or sources that haven't been used before.

19 Q. Professor Hoff, after you frame the question, you've
20 identified the sources, you've looked at the primary and
21 secondary and collected the information, what's the next
22 step in the historical method?

23 A. We gather what we call aggregate data from these two
24 kinds of sources which really just means we gather a lot of
25 facts and just lump them together.

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1 And the important thing that we have to teach
2 our students is then to look at this body of information
3 and to analyze it in such a way as to obtain or to get from
4 that body of information certain patterns, to perceive
5 certain patterns or generalizations so that we can then
6 begin to come to some conclusions about the material.

7 So the analytical process involves not so
8 much the gathering of the material, but the looking at that
9 material and coming to some conclusions or generalizations
10 from it.

11 Q. Professor Hoff, I think you may have mentioned this
12 earlier, but in the course of your teaching career, do you
13 teach graduate students in history how to use the
14 historical method?

15 A. Well, at Ohio University, I teach exclusively
16 graduate students. But I've taught this for a good 25
17 years.
18 Q. Professor Hoff, what is bias and hindsight?
19 A. Well, one of the things that's part of this
20 analytical portion of the historical method is that you
21 have to talk to your students about their own biases and
22 prejudices because we all bring a lot of baggage with us to
23 any, any subject that we are addressing.
24 And so we -- we make an effort to indicate to
25 the students that they should recognize their own biases

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1 and prejudices and not be -- let their analysis be
2 influenced by those things.
3 We also very strongly stress that you
4 shouldn't use contemporary values or contemporary opinions
5 in your analysis of the past because that simply means you
6 are imposing a value, let's say from the 1990s or from the
7 21st century, on the 19th or on the 20th century.
8 So what we teach them is not to use
9 hindsight, or to use it as little as possible, in their
10 analysis, because you are prejudicing the evidence if you
11 apply contemporary values to a time period of the past.
12 We are trying always to tell them to put the
13 evidence in the historical context of the period.
14 Q. Professor Hoff, is this the first time that you have
15 been asked to testify about the public's common knowledge
16 of the hazards of cigarette smoking?
17 A. No, it is not.
18 Q. How many times and what did you do?
19 A. I've testified three times before in cases involving
20 three different states.
21 Q. Were you asked to do the same thing in each case?
22 A. Well, in one sense I was, because when I first began
23 this type of research back in, I think it was 1994, I did a
24 very general survey of attitudes toward tobacco usage from,
25 say, the 1600s forward.

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1 And that informs my opinion in this case and
2 informed my opinion in those other cases.
3 But the uniqueness of each case is that I
4 always -- and any social historian would do this -- I
5 always feel that I have to look at the individual state
6 from which the plaintiff came to see what types of
7 information, either from the popular media or from the
8 educational system, that person might have been subjected
9 to in terms of forming some general awareness about, in
10 this case, the linkage between cigarettes and lung cancer.
11 Q. Professor Hoff, you told the jury a few moments ago
12 about the process of reviewing secondary sources and
13 primary sources.
14 Approximately how many articles have you read
15 and reviewed for your opinions in this case?
16 A. Again remember the articles are secondary sources,
17 can be secondary sources, but largely they were newspaper
18 sources which would make them primary.
19 And I've reviewed probably a couple hundred
20 articles over all, just for this case alone that are case
21 specific here.
22 Q. Okay. Let's discuss, then, the particular sources
23 you reviewed to arrive at your opinions in this case.

24 Do you have a demonstrative that would assist
25 the jury in understanding the sources that you considered

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1 in giving them opinions that you are going to give them
2 this morning?

3 A. Yes.

4 MR. COFER: Your Honor, do I have permission
5 to display that?

6 THE COURT: Yes.

7 MR. COFER: Thank you.

8 Q. Tell the jury, just, first, a general overview of the
9 sources of information you considered for your opinions in
10 this lawsuit, please.

11 A. Well, as you can see there, I looked at a number of
12 national news magazines, I think you can define them as.

13 Then I looked specifically at Ohio sources.

14 And then I looked at general popular media
15 presentations other than newspapers or national magazines.

16 Q. Professor Hoff, why did you review "Reader's Digest"?

17 A. Well, we tend to forget that "Reader's Digest" was
18 this incredibly popular, widely distributed national
19 magazine back in the 1950s. It had a subscription rate
20 that exceeded by twice or three times any other national
21 magazine, and it condensed articles so that people could
22 understand topics or come to an, at least, a partial
23 understanding of them and very quickly in a couple of
24 pages.

25 Q. And why did you review "Life" magazine?

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1 A. Well, "Life" again had its own unique
2 characteristics, but they were different from "Reader's
3 Digest" which condensed these articles.

4 "Life" was the first pictorial national
5 magazine. It became famous during the second world war
6 because of the pictures of battles that it published for
7 its readers.

8 So what "Life" does, and today it does it as
9 it did back then, but it was -- it was popular in the
10 fifties because it conveyed information to people without
11 having to require them to read very much.

12 They could look at the picture, read the
13 caption, and get the gist of the information. And the
14 plaintiff in this case said that he enjoyed looking at the
15 pictures in "Life" magazine.

16 Q. Why did you review "Time," "Newsweek" and "U.S.
17 News"?

18 A. For similar reasons of the other two, they were,
19 again for the fifties, the -- not as widely distributed or
20 as read, but they were the three major national news
21 magazines which would have been easily available to people
22 across the country and in the State of Ohio.

23 Q. With respect to the Ohio sources, why did you
24 read -- actually two questions.

25 Why did you review Ohio newspapers and which

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1 ones did you review?

2 A. Again, because I think it's important if you are
3 going to determine the general awareness or common
4 knowledge of a particular individual, you'd have to look at
5 the sources available for that individual.

6 So I looked at the "Cincinnati Enquirer," I
7 looked at the "Cleveland Plain Dealer," and of course I
8 looked very carefully at the "Akron Beacon Journal" where
9 the plaintiff lived.
10 Q. And how did --
11 THE COURT: May I see counsel at the bench
12 for a moment, please?
13 (Proceedings at side-bar:)
14 THE COURT: Well, I want to express a concern
15 about the direction that I think this testimony is going.
16 And it appears to me that it is the focus on
17 this particular decedent and his knowledge as opposed to
18 common knowledge of the ordinary person.
19 MR. COFER: It is not.
20 THE COURT: Well, she is going that
21 direction. She is talking about where the plaintiff lived
22 and the fact he read the "Akron Beacon Journal," he looked
23 at "Life" magazine.
24 She is personalizing this opinion on the
25 plaintiff.

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1 MR. COFER: What I will do --
2 THE COURT: I'm going to have to stop you if
3 it goes on.
4 MR. COFER: Okay. What I will do then is I
5 will advise Professor Hoff that what we are interested in
6 is the common knowledge of the ordinary person.
7 THE COURT: We will take a brief recess and
8 you can talk to her.
9 MR. COFER: I can do it in front of the jury.
10 THE COURT: I would rather take a brief
11 recess, you talk to her, because I don't want to shut you
12 down.
13 MR. COFER: We weren't going that way.
14 THE COURT: That's where she is going.
15 MR. COFER: We were establishing here is
16 common knowledge in the United States, here it is in Ohio.
17 THE COURT: Let me make my point clear: If
18 the decedent had been a Rhodes scholar and was a doctor,
19 you still would have to prove common knowledge of the
20 ordinary person.
21 By the same token, if the decedent had been a
22 dunce, somebody who is mentally defective, it would still
23 be the same test; it would not be personalized on the
24 particular decedent. And I feel very strongly about that.
25 So I want to be sure we don't get off on the

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1 wrong track, and I will take a little recess and you can
2 talk to her.
3 MR. COFER: Okay. That's fine.
4 (End of bench conference).
5 THE COURT: We will take a short recess. You
6 may file out. I'll call for you when we are ready.
7 It will only be about five minutes.
8 (Recess taken).
9 (Jury in).
10 THE COURT: Please be seated.
11 You may continue.
12 MR. COFER: Thank you, Your Honor.
13 BY MR. COFER:
14 Q. Professor Hoff, where I think we were when we took

15 the break is you just talked about you reviewed the "Akron
16 Beacon Journal," the "Cleveland Plain Dealer" and the
17 "Cincinnati Enquirer."

18 Tell the jury why you reviewed laws and
19 school text and curriculum, please.

20 A. Again because I wanted to see what was going on in
21 the State of Ohio with respect to legislation about what
22 should be taught in health classes.

23 And the State of Ohio has a fairly long
24 history of mandating certification for teachers in these
25 health classes to initially teach about what they call

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Hoff - Direct

1 alcohol and narcotics, and they include tobacco in that
2 narcotic category.

3 So going all the way back to the 1880s, you
4 find the State of Ohio legislature indicating it wanted its
5 teachers certified in these subjects, capable of teaching
6 them, and it had also began to mandate curriculum and
7 textbooks in the field of health.

8 And I wanted to see what that legislation was
9 like because it varies from state to state. And Ohio ended
10 up with a fairly precise and mandated educational system
11 with respect to what was taught in health classes.

12 Q. And, Professor, the last question on this board:
13 What relevance does popular culture have to your opinions
14 in this case?

15 A. Well, as I say, if -- because every, every society
16 conveys this general information, you have to look at, say,
17 popular songs or movies, or in our day and age television,
18 to see what is being conveyed.

19 And we couldn't, for example, laugh at jokes
20 or understand cartoons and laugh at them unless we had this
21 broad general awareness on certain topics.

22 Q. Professor Hoff, what we are interested in here is
23 whether there was common knowledge of the link between
24 cigarette smoking and lung cancer in Ohio between 1950 and
25 1965, correct?

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Hoff - Direct

1 A. That's correct.

2 Q. In order to put the 1950s into context, is it
3 important to have a general sense of how the public viewed
4 cigarette smoking before that?

5 A. Yes, it is.

6 Q. What are some of the earliest references you found to
7 health hazards or hazards to the lung caused by tobacco?

8 A. Well, as -- I did a study really of 3 or 400 years of
9 tobacco usage, and probably the earliest ones that are
10 relevant today are those that came in the early 1600s, in
11 the 17th century.

12 One of the most famous quotes that is cited
13 over and over again came from James, I, of England in 1604.
14 And James, I, was an interesting kind of ruler because he
15 had a special conscience. He's the one, for example, that
16 decided there should be a better translation of the Bible,
17 so we have the King James version of the Bible.

18 And in this case he was concerned about his
19 citizens in a health sense. He wanted them to be healthy,
20 and he went to the time and trouble of writing a pamphlet
21 on tobacco use.

22 MR. SMITH: I would move to strike, Your
23 Honor.

24 THE COURT: Overruled.
25 Q. And specifically, what did King James say of interest
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Hoff - Direct
1 with respect to your opinions in this case in the
2 "Counterblaste"?
3 A. Well, this is the famous quote that you can read in
4 practically every secondary source on the subject, and you
5 can see it there.
6 He went out of his way to say in one page of
7 this that "Tobacco usage was a custom," in England, he's
8 talking about, "loathesome to the eye, hateful to the nose,
9 harmful to the brain and dangerous to the lungs."
10 Q. Thank you, Professor.

11 Over the last 200 years, have there been
12 groups in the United States that have been opposed to
13 tobacco?
14 A. From the founding of the nation, particularly among
15 colonial ministers in New England, they constantly preached
16 from the pulpit against tobacco use.
17 They referred to these -- tobacco as a poison
18 in most of these lectures, and from that point forward
19 secular leaders picked up the idea and certain reform
20 groups did.
21 Q. Were there slang terms used to describe tobacco?
22 A. Again part of the common culture or common knowledge
23 on any topic, an indication of that common knowledge is
24 when slang terms come into vogue.

25 And with respect to cigarette smoking, the
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Hoff - Direct
1 first primary source I found on it or found about the use
2 of the slang terms was in the late 1880s where the terms
3 cancer stick and coffin nails began to be used in
4 newspapers to refer to cigarettes.
5 The "New York Times," by the 1990 -- 1890s, I
6 should say, was commonly using these slang phrases, and the
7 average person wouldn't understand these phrases unless
8 they have become a part of common knowledge.

9 Q. Let's go to the third item on the board, Professor.
10 Were there early smoking restrictions or
11 employers that had restrictions in the workplace?

12 A. Yes. A number of the major manufacturers in the
13 country around 1900 began to insist that their employees
14 not smoke.

15 Henry Ford and Thomas Edison are the better
16 known ones or the best known ones, but Marshall Field's did
17 this, Cadillac did this, a railroad -- railroad companies
18 also insisted that their employees not smoke around the
19 turn of the century.

20 Q. Thank you, Professor Hoff. And in the early 1900s,
21 did any states ban the sale of cigarettes?

22 A. Yes. Some of the secondary sources I read differed
23 on this matter so I had to look it up specifically, but I
24 determined that 16 states actually banned the sale of
25 cigarettes from about, say, 1890 to the beginning of the

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Hoff - Direct
1 first world war, 1914, 1917.
2 And two states actually banned cigarettes,
3 period.
4 Ohio tried both, but failed. They tried
5 three times between 1900 and 1911 to do this.

6 Q. And generally speaking, who initiated these efforts
7 to ban the sale of cigarettes, restrict tobacco use?
8 A. They came from a variety of sources.
9 Certain religious groups were against smoking
10 in the State of Ohio. But you had suffragists, women who
11 wanted equal -- the right for women to vote often took up
12 both the temperance movement against alcohol and also
13 joined movements against smoking.
14 And keep in mind that beginning of the
15 twentieth century, there was a very broad reform movement
16 going on in the country known as the progressive movement,
17 and many of those reformers agitated for these kinds of
18 bans or restrictions on cigarette use.
19 Q. And how are these local grass root efforts important
20 to your opinions in this case?
21 A. Well, I think that most legislation, whether the
22 bills pass in the State legislature or don't pass, the fact
23 that they are presented usually reflects some kind of
24 common knowledge about the subject and agitation at the
25 grass roots level on that subject matter.

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Hoff - Direct

1 And so that's why these pieces of legislation
2 are important. They are a reflection of common concern,
3 common knowledge on an individual topic like, in this case,
4 cigarette smoking.
5 Q. Professor Hoff, I don't want to discuss in detail.
6 You mentioned earlier, though, that you
7 looked at Ohio textbooks and curricula. Could you just
8 tell the jury generally what you found?
9 A. As I said from the late 1880s forward, the State of
10 Ohio mandated that its teachers be certified and capable of
11 teaching on alcohol and tobacco usage.
12 And by the 1930s, the State actually had
13 standardized tests which it issued to its students and had
14 them take on a periodic basis. And it also had a list of
15 recommended textbooks for these health courses.
16 MR. COFER: Your Honor, may I approach the
17 witness?
18 THE COURT: Yes.
19 BY MR. COFER:
20 Q. Professor Hoff, let me hand you what has been marked
21 as Exhibit PT 998.
22 Would you identify this for the record,
23 please?
24 A. Yes. This is called the Every Pupil Test which was
25 one of these standardized tests. This one happened to be

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Hoff - Direct

1 dated December, 1957.
2 Q. And let me ask you this: Did you review this test
3 and do you rely on it for the opinions you are expressing
4 in this case?
5 A. Yes, I did.
6 Q. Do you have a demonstrative that would illustrate to
7 the jury why this test is significant to your opinions?
8 A. Yes.
9 MR. COFER: Permission to display, Your
10 Honor?
11 THE COURT: You may.
12 MR. COFER: Please.
13 Q. Would you please tell the jury, Professor Hoff, what
14 the Ohio or the Every Pupil Test is and how that is

15 significant to your opinions in this case?
16 A. It was one of these uniform tests that the school
17 system used because it was legislated to do so.
18 And you can see this is a fill-in-the-blank
19 statement that the students are being queried about, and it
20 reads "Several scientists tell us that excessive blank may
21 cause lung cancer." Now, obviously the answer is smoking.
22 And what's interesting about these
23 standardized tests was not only was Ohio one of the
24 states -- not all states did this -- to have them, but I
25 for a number of years worked on the standardized aptitude

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Hoff - Direct

1 tests that students are given to get into college that
2 Princeton University puts together, and everytime we had a
3 statement like this, we realized that the teachers would
4 teach to that kind of question or statement, whether it be
5 fill-in-the-blank or multiple choice.
6 But we also knew that if we were considering
7 putting a question like that in, they were already teaching
8 about it because we had feedback from these school systems.
9 So these standardized tests reflect then
10 what's generally being taught out there, and they are an
11 important indicator of what common knowledge might be on
12 certain subjects.
13 Q. Thank you, Professor Hoff.
14 You've told the jury thus far about early
15 information and references to tobacco.
16 Let's move specifically to the 1950s. Okay?
17 How did common knowledge about the hazards of
18 cigarette smoking change in the 1950s?
19 And also, we have a summary chart that would
20 assist the jury in understanding the studies that were
21 published and how they were reported, is that correct?
22 A. That's right.
23 MR. COFER: Can everybody see this?
24 Q. Okay. First, would you just tell the jury generally
25 how the science changed or how common knowledge changed in

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Hoff - Direct

1 the beginning of 1950?
2 A. Well, keep in mind what I have been saying is that up
3 to 1950, there was this general awareness of the negative
4 image of tobacco usage and cigarette smoking with respect
5 to the health hazards associated with smoking and tobacco
6 use.
7 But what happened in the fifties is really
8 quite interesting. You begin to see in the national press
9 and in the State press and media, the -- an emphasis and a
10 publicizing of relatively complicated scientific studies.
11 And they begin to be publicized widely, nationally, in
12 1950 with the first study that you see there.
13 Q. The Wynder and Graham epidemiological study has been
14 discussed in this case already.
15 That was a major retrospective
16 epidemiological study published in 1950, is that right?
17 A. That's correct.
18 Q. Do you have an example of how it was reported in
19 "Reader's Digest"?
20 A. Yes, I do.
21 MR. COFER: Craig, would you put that up,
22 please?
23 Q. And would you tell the jury, Professor Hoff, how the

24 "Reader's Digest" article in January of 1950 is significant
25 to your opinions in this case?

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Hoff - Direct

1 A. Again you have to keep in mind, "Reader's Digest" had
2 been publishing anti-smoking articles since the 1920s, but
3 here it picked up on this study even before, if you look at
4 the code up there, even before the study was officially
5 published.

6 The quote reads "This probably refers to" --
7 "this" was the Wynder study, Wynder and Graham study --
8 "This probably refers to the most extensive and reliable
9 research yet made in this field, which is now being
10 completed by Dr. Evarts Graham and Wynder," and again "It
11 is expected to show that over 95 percent of the patients
12 with lung cancer smoke a pack of cigarettes a day and have
13 done so for many years."

14 What's interesting about this is not that
15 "Reader's Digest" did this; it knows a lot of this research
16 while it's going and before it is published.

17 MR. SMITH: May we approach the bench for a
18 moment?

19 (Proceedings at side-bar:)

20 MR. SMITH: Your Honor, I haven't objected,
21 but the way the witness is going, it's really -- this is
22 becoming Attorney Cofer's and --

23 MR. COFER: Proctor.

24 MR. SMITH: -- and Attorney Proctor's
25 testimony.

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Hoff - Direct

1 The question is not "Do you have an opinion?"
2 A board pops up with an opinion that Craig puts up there.
3 They are conducting normally direct examination, and I'm
4 objecting to not only leading but the answer being given on
5 the board.

6 THE COURT: If you have an objection that you
7 think it's leading --

8 MR. SMITH: I'm raising it.

9 THE COURT: But, you know, you've used the
10 same boards. You went through the same process with your
11 witnesses. You did with Dr. Blum.

12 He had -- the same board was up showing the
13 literature that was a broad showing that smoking cigarettes
14 was dangerous.

15 In fact, his testimony was as early as 1939,
16 that tobacco companies should have been publishing a
17 warning that there was a link between smoking cigarettes
18 and lung cancer.

19 I mean, but you used the same kind of
20 exhibits to assist in the presentation of his testimony, so
21 at this point I don't see any difference.

22 But if you think the question itself is
23 leading, just object and say "leading."

24 MR. SMITH: I want to point out, I think
25 there is a difference, though, because these boards, they

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Hoff - Direct

1 are pulling out whole quotes, putting them up there, having
2 items one, two, three, four.

3 The time line board was not constructed that
4 way.

5 THE COURT: Remember, Dr. Blum was also

6 reading quotes. They just used a different type of
7 demonstrative evidence.
8 You showed -- you put yours up on the screen,
9 and they are doing theirs with a -- you put up your
10 exhibits on the screen and had Dr. Blum read from them.
11 Now, these boards actually show the quote and the witness
12 refers to the quote, but in my view I don't see any
13 difference between how it's being handled.
14 MR. SMITH: I'd ask the Court to consider
15 this: When Dr. Blum was testifying, he pulled -- he
16 selected his own ads, he put them up and then he read -- I
17 asked him to read what they said.
18 Here they are putting up what they want said
19 before she says a word.
20 MR. COFER: May I at least --
21 THE COURT: Let me turn the noise on.
22 MR. COFER: Okay.
23 (Pause).
24 MR. COFER: There are actually, as I see it,
25 two ways to do this, to lay the proper foundation.

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Hoff - Direct

1 What I have done is I have all of the
2 underlying articles from which the boards were made. I've
3 provided copies of those to Mr. Smith, and copies of those
4 in the report.
5 What I could do is go through and lay a
6 foundation, as I did with the Every Pupil Test, with
7 respect to each board.
8 I don't think I'm required to do that under
9 Federal Rule of Evidence 1006 in that these are summaries
10 of voluminous materials. And I think it assists the jury
11 in understanding how those materials affect the witness's
12 opinions in the case.
13 And --
14 THE COURT: Well, but generally, I understand
15 that the plaintiff has an objection to the process you are
16 using in examining the witness by use of these
17 demonstrative exhibits which show the quote that's being
18 relied upon.
19 That's your objection.
20 MR. SMITH: After the leading question that's
21 coming.
22 THE COURT: And I will respond to any
23 objection you make with respect to leading question, but
24 you are objecting to the process, and that's overruled.
25 (End of side-bar conference).

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Hoff - Direct

1 BY MR. COFER:
2 Q. We were talking about how the 1950 Wynder and Graham
3 article was reported in "Reader's Digest."
4 Was it also reported in "Newsweek"?
5 A. Yes.
6 Q. Did you have a board that shows how it was reported
7 in "Newsweek" and that would assist the jury in
8 understanding your opinions of the significance of that
9 report to your opinions in this case?
10 A. Yes, I do.
11 Q. And, Dr. Hoff, would you tell the jury how this
12 article in "Newsweek" affects your opinions in this
13 lawsuit?
14 A. As you can see, this one came later in the year,

15 after the report actually appeared in the Journal of the
16 American Medical Association.

17 And "Newsweek" then is saying that based on
18 this study, "In the past 50 years, the incidence of lung
19 cancer has increased to the point where it is now one of
20 the leading forms of cancer death in men."

21 And notice there then it also says, and of
22 course in the article, "Last week in this journal, a survey
23 brought this relationship out of the rumor category with
24 statistics to show that the more heavily a person smokes,
25 the greater are his chances of being afflicted."

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Hoff - Direct

1 In other words, when they say "out of the
2 rumor category," it means they are saying there is now
3 scientific, statistical evidence to back up the common
4 knowledge about ill effects generally associated with
5 smoking.

6 Q. And, Professor Hoff, I'm not sure the jury can see
7 the date.

8 A. I'm not sure I can.

9 Q. Yes. It's at the bottom?

10 A. It's in June of 1950.

11 Q. And it says "just last week"?

12 A. "Last week."

13 The article actually appeared at the end of
14 May in the Journal of the American Medical Association.

15 Q. Now, if you'll look at the time line, I don't know
16 whether you can see it from here, but it also shows there
17 is a Doll and Hill epidemiological study in 1950, is that
18 correct?

19 A. That's true.

20 Q. And one in 1952 as well?

21 A. Um-hmm.

22 Q. Do you have an exhibit that shows how Ohio newspapers
23 reported the Doll and Hill study in 1950 and the one in
24 1952?

25 A. Yes.

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Hoff - Direct

1 MR. COFER: Could you put that up, please?

2 Q. And, Dr. Hoff, could you tell the jury how these two
3 newspaper articles affect your opinions in this lawsuit?

4 A. What's significant here is that both of these
5 newspapers --

6 Q. Let me ask you, first --

7 A. In this case it's the same newspaper, I'm sorry.

8 Q. The top one?

9 A. Yeah.

10 Q. And you can step down, if you would like, if it helps
11 you see.

12 Could you tell the jury the date of the top
13 one, please?

14 A. Yeah, it's in December of 1950.

15 And so -- and the other one is in December of
16 1952. So they are two years apart because these two
17 studies by Doll and Hill took place two years apart.

18 What's significant here is that these were
19 foreign studies, they took place in England, and a local
20 newspaper was picking up on them and publishing them for
21 their readers to look at and evaluate.

22 And you can see there that the first quote
23 says "A new British study says that smoking seems to be an

24 important factor in producing cancer of the lungs."
25 And then quoting the study again in '52 by
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Hoff - Direct

1 these same two men, "Our estimates indicate that the risk
2 of dying of lung carcinoma increases in approximately
3 simple arithmetical proportion to the amount smoked."
4 The importance here is these were foreign
5 studies being picked up by a local newspaper.
6 Q. Now, the next item on the time line is the 1953
7 Wynder and Graham mouse skin paint studies, is that
8 correct?
9 A. Yes, it is.
10 Q. And do you have a board first that shows generally
11 how this was reported in two or three different media?
12 A. Yes.
13 Q. And if you would, tell the jury just how this general
14 publication with respect to the mouse skin painting affects
15 your opinions in this case, please.
16 A. Well, this is "Life" magazine, and as I said it was
17 famous for its pictures, and you are only seeing a portion
18 of the pictures on this mouse study. There are about two
19 dozen of them.
20 Q. In fact, do you have a board that shows more
21 specifically "Life"? Could you put that up, please?
22 I'm sorry, go ahead, Doctor.
23 A. And the importance, of course, is that readers of
24 "Life" could look at the pictures, and in this case Wynder
25 and Graham earlier had just presented these dry statistics

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Hoff - Direct

1 in their 1950 study.
2 Here they have a live subject, that is mice,
3 and so the pictures kind of jump out at you and much more
4 was made, I think, and the pictures were much more
5 influential because they involved these mice who had been
6 painted with tobacco tar.
7 Q. And do you have an example of how the "Cleveland
8 Plain Dealer" reported the Wynder mouse skin painting
9 study?
10 A. Yes.
11 Q. And would you tell the jury, please, how this affects
12 your opinions in this case?
13 A. This, the story was a kind of background piece on
14 tobacco usage.
15 It was a syndicated AP story which meant it
16 was sent out all over the country. But when the "Cleveland
17 Plain Dealer" got ahold of it, the editor read it,
18 obviously, and then took the trouble to put in an editor's
19 note, which is quoted here because what the article does is
20 present the kinds -- as it says, the pros and cons of the
21 issue. And the editor wanted the reader to know this, and
22 what his statement reflects is common knowledge.
23 "Everybody knows the old saying," that's
24 really a reference to demonstrate knowledge, "every time
25 you light a cigarette you put another nail in your coffin."

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Hoff - Direct

1 That's a reference to these slang terms which make up
2 common knowledge.
3 "Today some medical researchers say there
4 may be something to it. Others put up strong arguments to
5 the contrary. Either way," the editor is saying, "there is

6 grave concern over the question: Does cigarette smoking
7 cause cancer? Here's the broad picture and the pros and
8 cons in this spreading controversy."
9 Q. And, Professor Hoff, can you see the date of that
10 paper?
11 A. That is January 24th, 1954.
12 Q. Thank you, Doctor.
13 The next thing we have on the time line is
14 the American Cancer Society Hammond and Horn, 1954 study.
15 A. Um-hmm.
16 Q. Do you have a board that tells how it was reported in
17 "Time" and "Newsweek"?
18 A. Yes.
19 Q. Could you explain to the jury, please, how this
20 affects your opinions, in this lawsuit?
21 A. This 1954 study was sponsored by the American Cancer
22 Society, and so the national news magazines of course
23 reported on it.
24 And again, it is reporting this increasing
25 statistical evidence of this linkage between smoking and

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Hoff - Direct

1 lung cancer.
2 So you can see there "Death from lung cancer
3 is three to nine times as common among cigarette smokers as
4 among nonsmokers, and five to 16 times as common among
5 those who smoke a pack a day or more."
6 And then that's from "Time," but in
7 "Newsweek," very specifically -- and "Time" did the same
8 thing -- indicating that the American Cancer Society for
9 the first time took official action to warn the public of
10 the possible dangers of smoking.
11 "The presently available evidence, its
12 resolution" -- that is society passed a resolution --
13 "indicates an association between smoking and particularly
14 cigarette smoking and lung cancer."
15 That's an American study being publicized in
16 the national press.
17 Q. Professor Hoff, I don't want to spend a lot of time
18 on it, but do you also have a board that shows how Ohio
19 newspapers reported the 1954 American Cancer Society
20 Hammond and Horn report?
21 A. Yes.
22 Q. And again, just briefly, what about the way the Ohio
23 newspapers reported the results of this study is
24 significant to your opinions in this case?
25 A. Yeah. We have two newspapers here, the "Akron Beacon

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Hoff - Direct

1 Journal" and "The Plain Dealer," and what I found
2 interesting, as I read these stories, is that the Akron
3 paper in particular had very direct, concise headlines
4 which usually condensed the entire story for the reader.
5 Look at that, "Men, 50 to 70 die sooner, link
6 cancer cigarettes in new report."
7 So the average reader could have looked at
8 the headlines and gotten the gist of this.
9 But then you can see from these quotes that
10 they are again saying that there is an increase in heart
11 disease and cancer among male smokers.
12 The quotes are fairly similar to the other
13 ones.
14 Q. Professor Hoff, let's shift gears for a second.

15 Did you review any polling data which affect
16 your opinions you are going to express in this case?
17 A. Well, as a cultural and social historian, once we
18 gather the kind of information I talked about earlier, if
19 there are polls on the subject matter we are
20 studying -- and remember, before 1935 there weren't going
21 to be any -- we do look at them to see if they correlate
22 with what our generalizations are coming from other
23 sources.
24 Q. Do you have a couple of polls that Gallup ran in
25 1954?

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Hoff - Direct

1 A. Yes. Yes, I do.
2 Q. And could you put the first up, please?
3 And would you tell the jury, first, when
4 this -- this was January, 1954, is that correct?
5 A. That's correct.
6 Q. Tell the jury how this poll affects your opinions in
7 this case.
8 A. Remember, this would have been on the heels of the
9 mouse study reports.
10 What you can see there is that you've got 83%
11 answering this question positively. "Have you heard or
12 read anything recently that cigarette smoking may be a
13 cause of lung cancer?"
14 And that, as I say, was in January of '54.
15 Q. Is there -- was there another poll in June of 1954
16 that asked a very similar question?
17 A. Yes.
18 MR. COFER: And could you show that, please?
19 Q. And tell the jury, just briefly, how that poll
20 affects your opinions in this case.
21 A. Here in June of '54, you would have had further
22 reports in the newspapers and, to a certain degree, on
23 television about these scientific studies.
24 And now the question is: "Have you read or
25 heard anything recently to the effect that smoking may be a

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Hoff - Direct

1 cause of lung cancer?"
2 And you can see the percentage jumps up to
3 almost 90%.
4 Q. The next item on the time line, Professor Hoff,
5 there's actually two matters in 1957, the Hammond and Horn
6 American Cancer Society study, and also something that's
7 called the seven experts study.
8 Is that correct?
9 A. That's right.
10 Q. First, could you tell the jury, what was the seven
11 experts study?
12 A. This was a report of a panel of scientists that a man
13 named Leroy Bernie, who happened to be the Surgeon General
14 in this time period, he appointed this committee or this
15 panel in 1956, and it reported to him in '57 on this very
16 specific topic of the statistical linkage that was being
17 shown in these studies between lung cancer and smoking.
18 Q. And was the seven experts' report, the results of
19 that, published in "Time" and "Newsweek"?
20 A. Yes.
21 Q. And do you have a blowup that would assist the jury
22 in understanding how they influence your opinions in this
23 case? Yes?

24 A. Yes, I do.
25 Q. And how do they affect your opinions?

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Hoff - Direct

1 A. Well, the difference here is these previous studies
2 have been conducted either by the American Cancer
3 Association or by scientists independently.

4 This was a government report, and so the two
5 national news magazines are reporting them in this fashion
6 and stressing that it is a government report.

7 "Cigarette smoking," in one case it's
8 significant, "is indeed a major cause of lung cancer."

9 And then it says here "The sum total of
10 scientific evidence up to this point," that is '57,
11 "establishes beyond a reasonable doubt that cigarette
12 smoking is a causative factor in the rapidly increasing
13 incidence of human lung cancer."

14 And so the fact that this is a government
15 report is what is significant about it, and the fact, of
16 course, it's going to get national coverage.

17 Q. Did Ohio newspapers also cover the seven experts'
18 study?

19 A. Yes.

20 Q. And do you have a board that shows a couple examples
21 of those?

22 A. I do.

23 Q. And could you tell the jury how that's significant to
24 your opinions in this case?

25 A. Well, again it just shows the filtering down at the

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Hoff - Direct

1 local level of this story, which in this case the local
2 paper is quoting Bernie himself saying "There's increasing
3 evidence that excessive cigarette smoking is a causative
4 factor here in lung cancer."

5 And the other story saying this group of
6 seven scientists in a report made public, that scientific
7 evidence establishes beyond a reasonable doubt that
8 cigarette smoking is a causative factor.

9 So they are repeating, to a certain degree,
10 at the local level for the average reader the same
11 information.

12 Q. Professor Hoff, you were talking about the seven
13 experts' study.

14 Also in 1957, Hammond and Horn had the
15 American Cancer Society study, correct?

16 A. Yes.

17 Q. And was there another poll that was taken in 1957
18 that asked whether people saw that specific study?

19 A. Yeah.

20 Q. And do you have that, and would you please explain to
21 the jury how that affects your opinions in this case?

22 A. Well, in this instance, if you recall the earlier
23 questions which were put up, they were quite general about
24 have you heard or read anything.

25 This one is quite specific. "Have you heard

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Hoff - Direct

1 or read about the recent report of the American Cancer
2 Society," the Hammond and Horn report, "reporting the
3 results of a study on the effects of cigarette smoking?"

4 And here you have almost 80%, 77% indicating
5 that they had heard about this specific report because of

6 this widespread publicity it was being given.
7 Q. Professor Hoff, jumping ahead to 1962, the Royal
8 College of Physicians, first what was the Royal College of
9 Physicians' report?
10 A. It was a report from a medical group, in the most
11 prestigious medical group in England at the time, about the
12 hazards of cigarette smoking.
13 Q. And do you have examples of how that was reported in
14 the national media in this country?
15 A. Yes.
16 Q. And how is the way it was reported in "Newsweek," how
17 does that affect your opinions in this case?
18 A. Well, what it shows again is that our national press
19 is picking up on a foreign study, showing that at least the
20 editors of "Newsweek" in this case, and the other news
21 magazines, think that this issue is of such gravity that
22 foreign reports collaborating -- or corroborating our own
23 scientific studies were important enough to publish
24 information about.
25 And here you see the statements becoming much

711

Hoff - Direct

1 more direct. "Cigarette smoking is a cause of lung cancer,
2 the Royal College of Physicians stated."
3 Q. Do you have an example of how local newspapers
4 published it?
5 A. Yes.
6 Q. And again just very briefly, how does that support
7 your opinions in this case?
8 A. In this instance, it reports the same thing that the
9 national press is, but the local paper here, the Akron
10 paper, picked up on the fact that in this instance, the
11 Royal College of Physicians had asked the government to do
12 something.
13 And in fact, the Ministry of Health began to
14 distribute posters warning against cigarette smoking, and
15 you can see the quote there about "Danger! The more
16 cigarettes you smoke, the greater the risk from death from
17 lung cancer." You have been warned.
18 So it's advocating government action and it
19 gets government action.
20 Q. And, Professor Hoff, do you know when the United
21 States Surgeon General advisory committee was formed?
22 A. The Surgeon General advisory committee for?
23 Q. The surgeon -- that ultimately came out with the
24 Surgeon General's report?
25 A. It was formed in 1962, the same year that this report

712

Hoff - Direct

1 was issued at the -- on the order of President Kennedy.
2 And it's going to report back in a couple of
3 years later.
4 Q. Professor Hoff, are these examples the only media
5 that you see, the only reports that you reviewed that
6 talked about the link between cigarette smoking and lung
7 cancer between 1950 and 1965?
8 A. No. They are simply representative of a much broader
9 group of stories and headlines that are quite similar.
10 Q. Do you have a summary exhibit that shows how the link
11 between cigarette smoking and lung cancer was reported in
12 the "Akron Beacon Journal"?
13 A. Yes, I do.
14 Q. And again, just generally, could you tell the jury

15 how these reports, how these articles, affect your opinions
16 in this case?
17 A. What I've said about the "Journal" already is that
18 its headlines were very direct and concise, and so you
19 simply have to read them to get the gist of the story.
20 And these stories run from '54 through '57,
21 and are quite to the point.
22 Anyone just glancing at the newspaper would
23 have seen these headlines, even if they didn't read the
24 story.
25 Q. Now, earlier you talked about the significance of

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Hoff - Direct

1 "Reader's Digest" in reporting on the issue of smoking and
2 lung cancer.
3 First, let me ask you, was "Reader's Digest,"
4 did it have kind of a unique history with respect to its
5 role in cigarette smoking and lung cancer?
6 A. Yes, it did. It was founded by a couple, Wallace and
7 Lila DeWitt back in 1922, and they both were avidly opposed
8 to cigarette smoking. So from 1924 on, it was the leading
9 national magazine to publish anti-smoking articles.
10 Q. And do you have a summary chart that would show the
11 jury just some of the articles that "Reader's Digest"
12 published over the years about cigarette smoking and lung
13 cancer?
14 A. Yes.
15 Q. And again, how does this affect your opinions in this
16 case?
17 A. Well, again, one can just look at the headlines,
18 among other things.
19 But keep in mind, these were very short
20 articles, two or three pages that a person could read in a
21 few minutes.
22 And beginning back for the time period I
23 looked at now -- these articles against smoking were
24 earlier than this as well, some of them were -- from '52
25 again down to '64, you see a series of articles, some of

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Hoff - Direct

1 them, Cancer by the Carton was a very famous one which
2 "Reader's Digest" reprinted and reprinted and reprinted in
3 this time period. So it didn't only show these articles or
4 publish these articles once.
5 And you can see the second article there
6 going over the controversy within the scientific
7 profession, one of them saying "Lung cancer and cigarettes,
8 cigarette controversy."
9 But then you find in '64, this very stark
10 headline, "Cigarettes found -- tried and found guilty,"
11 very much to the point, and then the article confirming
12 that.
13 Q. And of course, Professor Hoff, in 1964, that's when
14 the United States Surgeon General's report was published,
15 is that correct?
16 A. That's correct.
17 Q. And do you have a board that shows examples for Ohio
18 newspapers as to how that report was published?
19 A. Yes.
20 Q. And would you please tell the jury how that affects
21 your opinions in this case?
22 A. You can see here the very large headlines on the
23 front page of these State newspapers. And again remember

24 President Kennedy had appointed a commission, it was known
25 for several weeks in advance it was going to issue its

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Hoff - Direct

1 report.

2 And this is the kind of strong focus and bold
3 headlines that were representative of not only Ohio, but of
4 the nation.

5 And on the bottom there, you can see a
6 cartoon again relating to common knowledge on the subject,
7 but standing out as perhaps more effective than even some
8 of the headlines.

9 Q. I have one more board I want to show.

10 MR. COFER: But first, Your Honor, may I
11 approach the witness?

12 THE COURT: Yes.

13 Q. Professor Hoff, let me show you what has been marked
14 as PT Exhibit 1079.

15 This is an article from "The Plain Dealer," a
16 special interest story, "Criticism fails to stunt weed."

17 Is that correct, ma'am?

18 A. Yes.

19 Q. And have you reviewed that and do you rely on that
20 for your opinions in this case?

21 A. Yes, I did.

22 Q. Have you prepared a demonstrative that will assist
23 the jury in understanding how that affects your opinions in
24 this case?

25 A. Yes.

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Hoff - Direct

1 Q. Let me ask you this question: In 1964, was the
2 Surgeon General's report new news?

3 A. Well, as I looked back at both the national and local
4 coverage, I found that it wasn't reported as new news.

5 It was reported as a kind of accumulation of
6 evidence that had been increasingly available to the public
7 for at least the last decade or more.

8 And so in that sense, the report, even though
9 it got great publicity because it was an official
10 government report, did not, in essence, tell the average
11 reader anything that he or she already hadn't read in these
12 earlier stories.

13 But what's interesting about this
14 demonstrative, the report itself came out on January 11th,
15 and you can see here that's January 12th, it happens to be
16 a Sunday, feature story on the -- on tobacco usage.

17 And what this story does, clearly it was in
18 their files, they had been preparing this story either in
19 the last couple of weeks or had prepared it over time, and
20 it goes back and reviews common knowledge about tobacco
21 usage, quoting James, I, quoting others from the 1600s and
22 1700s, going down through some famous Americans who had
23 spoken out against tobacco usage and specifically smoking.

24 So that what this shows is that the editor,
25 realizing that this report was coming out, had had one of

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Hoff - Direct

1 his reporters prepare a background piece, so reviewing
2 common knowledge on the subject.

3 Q. I know the copy I gave you isn't particularly clear,
4 but I'd like you to read, if you would, just the first
5 paragraph or so to the jury.

6 And if you need to step down and use the
7 board.
8 A. I think I can read this.
9 Q. Can you read it?
10 A. Um-hmm.
11 Q. Would you do that, please?
12 A. And the very first paragraph starts out "From the
13 time tobacco was first smoked in the so-called civilized
14 world, warnings have been issued about it and yet
15 cigarettes" -- I guess I can't read it.
16 Cigarettes what?
17 Q. Let me get you a microphone so you can step down.
18 A. "Cigarette sales consistently reach new heights."
19 Q. Hello? Hello?
20 Would you like to step down where you can see
21 better?
22 A. Yeah.
23 Q. All right.
24 A. "Cigarette sales consistently reach new heights.
25 People call them coffin nails -- called them coffin nails

718

Hoff - Direct

1 long ago not knowing just why. Now, the U.S. public health
2 service is explaining."
3 And then it goes into a 1950 poem about it,
4 it mentions Sir Francis Drake, it mentions James, I, and
5 Edison and others who opposed it.
6 Talks about the 1930s, and in essence is
7 reviewing for the reader of the "Plain Dealer" on this
8 particular Sunday all the common knowledge that had
9 appeared about tobacco usage and then cigarette smoking in
10 specifically.
11 Q. Professor Hoff, thank you. You can take your seat
12 again, please.
13 What we have talked about this morning is the
14 basis for your opinions or the bases for the opinions that
15 you are going to render in this case.
16 We've talked about the work you've done,
17 we've talked about what you have relied on, so let's get to
18 the opinions you are here to offer.
19 First question, Professor Hoff: As a
20 professional historian, with over 30 years of experience in
21 researching historical issues, have you formed an opinion
22 to a reasonable degree of professional certainty, as to
23 whether the link between cigarette smoking and lung cancer
24 was common knowledge in the United States between 1950 and
25 1965?

719

Hoff - Direct

1 A. Yes.
2 Q. Do you have an opinion?
3 A. Yes.
4 Q. What is that opinion, Doctor?
5 A. It's that after reviewing what was available to the
6 average reader in a variety of media forms, that
7 the -- there was an increased general awareness of the
8 scientific studies, which all of which claimed to show a
9 link between cigarette smoking and cancer, lung cancer.
10 Q. Okay. And, Dr. Hoff, as a professional historian
11 with over 30 years of experience in researching historical
12 issues, have you formed an opinion, to a reasonable degree
13 of professional certainty, as to whether the link between
14 cigarette smoking and lung cancer was common knowledge in

15 Ohio between 1950 and 1965?
16 A. Yes. And for the same reason.
17 Q. And what is your opinion, Dr. Hoff?
18 A. The reader of especially local newspapers in Ohio
19 would have been apprised of, by those newspapers, about
20 these studies, and have seen headlines directly linking
21 cigarettes to lung cancer.
22 Q. Dr. Hoff, thank you very much.
23 That's all I have.
THE COURT: I will take a brief recess, about
24 ten minutes.
You may file out.
25 (Jury out).
(Recess taken)

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Cross - Hoff

1 THE COURT: Please be seated.
2 I want to just direct, I want to say just
3 generally to those that are spectators, that you are
4 in the courtroom at my sufferance. If there is any
5 conduct by any individual person in the audience that
6 I find is inconsistent with a fair trial to everybody
7 concerned in this case, that person will be excluded
8 from this courtroom for the balance of the trial.
9 You may continue now with your cross
10 examination.
11 MR. SMITH: Thank you, your Honor.
12 - - -
13 CROSS EXAMINATION (CONT.)
14 BY MR. SMITH:
15 Q Doctor Hoff, would you please tell us what the
16 definition of common knowledge is as you applied to this
17 case?
18 A Yes, it's what I said before.
19 THE COURT: Well, wait a minute, we have to get
20 our mike on.
21 A It's what I said before, it's the lowest common
22 denominator of information that a culture or society conveys
23 to its people.
24 Q You had mentioned at the end of your direct testimony
25 regarding being aware of information and does that apply to

721

Cross - Hoff

1 what you just said to your definition? I thought it was
2 your definition, but I'm trying to find out your precise
3 definition?
4 A Well, I started out in the testimony by giving the
5 definition I just gave about the lowest common denominator
6 of information. And then one has to show how that's
7 conveyed to society or conveyed to a group of people. And
8 that's usually then through some kind of mass media.
9 Q And when you use the phrase?
10 A In our day and age or within the time period we are
11 concerned with.
12 Q At the conclusion, when you were asked your opinions I
13 didn't hear you mention the phrase lowest common
14 denominator, I heard you use a different approach I thought,
15 and I'm trying to understand exactly where you stand on this
16 issue.
17 A Well, I think I've stated it as well as I can. You
18 have a very general low level passive kind of information
19 that a society conveys in any given time period and that it
20 conveys it in certain ways to increase or enhance the

21 general awareness on that topic.
22 MR. SMITH: Your Honor, may I ask the court
23 reporter to read part of that answer back to me, or if
24 I can look at the live time.
25 BY MR. SMITH:

722

Cross - Hoff

1 Q Dr. Hoff, under that definition do you have an opinion
2 as to when the tobacco companies would have had the
3 knowledge that we are speaking of here?
4 A Would have had common knowledge?
5 Q Yes, ma'am?
6 A I didn't study tobacco documents from the companies
7 themselves, but individuals within the companies would have
8 had the same common knowledge information and awareness as
9 the general public.
10 Q That would include the Presidents of the companies?
11 A Assuming they were born and raised in the United
12 States.
13 Q The research people?
14 A Yes.
15 Q When you you've done research regarding various
16 things, have you done research about regarding professional
17 organizations as well as lay people?
18 A I studied a number of business organizations from the
19 1920s.
20 Q Did you ever study them for the purpose of determining
21 what they knew about something?
22 A I studied them largely to find out what, what
23 committees, let's say, within the organization might have
24 been responsible for making public statements to the
25 Congress or to take positions, certain policy positions.

723

Cross - Hoff

1 Q From doing your work, did you come to the belief that
2 those people on those committees would acquire more
3 knowledge than the general person on the street about the
4 topic in which they were involved?
5 A I think the general answer is, yes, assuming that
6 there was information on that general topic that went beyond
7 what was common knowledge level.
8 Q Do you have an opinion as to whether or not there was
9 more information provided to tobacco companies than there
10 was to the person on the street regarding the question of
11 the linkage between smoking and lung cancer, please?
12 A No, I don't, because I wasn't studying tobacco
13 companies for this case.
14 Q And I believe that I asked you that question one time
15 before, is that correct, when we had the opportunity to take
16 depositions of all the experts in this case?
17 A Yes, you did.
18 Q And I think at that time that was your same, generally
19 your same answer, is that correct?
20 A That's correct.
21 Q And you haven't done any research on that since that
22 time or given any more thought?
23 A No, because I'm looking at publicly available
24 information that was there for the average person.
25 Q When you did your research on this topic, did you look

724

Cross - Hoff

1 at advertisements, Dr. Hoff?
2 A I looked at some, in these, especially in the national

3 magazines.
4 Q And would you tell us, please, your general definition
5 of what you mean by some as you are using it right now?
6 A Well, I am not a specialist on advertising, but as you
7 thumb through any of these magazines or look at them on
8 microfilm you come across a variety of ads, yes.
9 Q Was that part of your focus in this case?
10 A No, it was not.
11 Q So, I want to make sure I'm stating this properly.
12 The opinions that you've come to in this case,
13 under your definition of common knowledge, do not include
14 any impact of advertisements on that common knowledge?
15 A You can -- as a social historian you look at ads and
16 you realize that advertising is part of a wide variety of
17 information that average people are subjected to or look at
18 in the course of their daily activities in reading magazines
19 or newspaper.
20 So it's a component part, but it isn't one that
21 I focused on exclusively or to any great degree.
22 Q It wasn't one of the major components of your work, is
23 that true?
24 A No, that's true.
25 Q And in fact, you selected a reasonable amount of

725

Cross - Hoff

1 material, is that correct, insofar as supporting
2 documentation?
3 A I believe so, yes.
4 Q And forgive me for a quick, if you put it on, stood it
5 up, would it be maybe be two to three feet high, the papers?
6 A I don't have any idea. I, as I said, I looked at
7 several hundred articles, I don't know how high they would
8 stack if you stacked them. Some of them would have been on
9 microfilm and other media.
10 Q Were any of the papers you collected papers that were
11 advertisements?
12 A Yes. I had collected advertisements from previous
13 cases in which I testified.
14 Q I'm sorry, approximately how many advertisements did
15 you pick up in this, have you copied and put as part of your
16 exhibits?
17 A Oh, I would say if I looked back at the other cases,
18 going back to '94, maybe in my files I have a good, probably
19 80 to 100 examples of ads.
20 Q And how many of those did you submit as reference
21 authorities for this case?
22 A None.
23 Q Might I trouble you gentlemen for the Readers Digest
24 board, please?
25 MR. COFER:Which one?

726

Cross - Hoff

1 MR. SMITH:The one that had the 6.
2 MR. COFER:Sure.
3 Would you like it on the easel?
4 MR. SMITH:Do you mind?
5 MR. COFER:No.
6 MR. SMITH:Thank you, sir.
7 BY MR. SMITH:
8 Q I took a quick -- or let me ask this question if I
9 may.
10 Did you personally prepare these boards?
11 A Physically prepare these boards?

12 Q Yes, ma'am?
13 A Of course not.
14 Q And do you know who did prepare them?
15 A The lawyers prepared them for me after I looked at the
16 material.
17 Q And I'm going to ask you a question and I'm not trying
18 to be cute with it but I want to make sure we are all aware
19 of it.
20 These boards have yellow markings on them, is
21 that correct, to highlight various items?
22 A That's correct.
23 Q To assist your presentation?
24 A Yes.
25 Q What I want to submit is when a person buys a

727

Cross - Hoff

1 newspaper or a magazine, generally there is no highlighting
2 on it?
3 A True.
4 Q So while we, in the presentation we make things leap
5 out at our audience, when you read the newspaper you don't
6 have that colored advantage generally for things to leap out
7 at you?
8 A Except for the headlines'.
9 Q I'm saying the color advantage?
10 A No, you don't have highlighted headlines, that's true.
11 Q Or highlighted paragraphs?
12 A That's true.
13 Q I haven't went close to those but I was trying as best
14 I could to read them, and it struck me that the middle two
15 both indicate the cigarette controversy, is that correct?
16 A That's correct.
17 Q And that would be important to someone being aware
18 that there was a controversy and it included cigarettes?
19 A Yes.
20 Q When you look at those six boards, it strikes me, and
21 I may see it wrong, but that the bottom right board, which
22 is the last board in 1964, is the only board up there where
23 Readers Digest really seems to try in their article to put
24 to rest what they had reported as the controversy, would
25 that be fair?

728

Cross - Hoff

1 A In reporting on the '64 report.
2 Q Yes, ma'am?
3 A Which was a report surveying earlier studies.
4 Q Yes. Would you agree to that?
5 A I think I agree to that.
6 Q Okay. And that is in 1964?
7 A Yes, it is.
8 Q You had indicated earlier that under your definition
9 of common knowledge, that you felt that there was common
10 knowledge regarding the smoking and lung cancer, the
11 linkage, is that correct?
12 A That there was increased awareness of that linkage in
13 the 1950's.
14 THE COURT:Ma'am, the issue is common knowledge
15 that the ordinary person had, not increasing
16 awareness.
17 THE WITNESS:Well, the common knowledge prior to
18 1950.
19 THE COURT:The reason I interrupted you is that
20 you it seems to me you strayed away from common

21 knowledge and introduced your own definition of what
22 you think common knowledge is.
23 That's for me to define for the jury is the
24 way that the legislature has set it forth in the
25 statute. But when he asks you about common knowledge

729

Cross - Hoff

1 I would prefer if you would respond to him in the
2 context of common knowledge given the shape of the law
3 that applies in this case.
4 MR. SMITH: I would like to ask her this
5 question, if I might, with the court's permission.
6 Q I really sense that you are giving us your honest
7 definition as to how you have approached this through your
8 mind, isn't that true?
9 A Yes.
10 Q Both in your report and your deposition and today?
11 A Yes.
12 Q And it is my understanding it is your belief that as
13 the '50s progressed there was the public awareness became
14 greater, there was more information coming to them?
15 A Yes, in these popularized forms.
16 Q And when you got into the '60s, I'm assuming you are
17 indicating there was even more. I'm not trying to put words
18 in your mouth, but is that true?
19 A Yes, in a general sense.
20 Q So from the period 1950 to 1965, in general, more
21 information kept coming out, is that true?
22 A Yes.
23 Q Can you tell me approximately how many Cleveland Plain
24 Dealers you looked at, Dr. Hoff?
25 A Well, I would have looked at all of them for the

730

Cross - Hoff

1 specific dates that corresponded to these major scientific
2 reports.
3 In other words, it's fairly easy to compile a
4 list of the reports and then using indexes to find the
5 coverage in the newspaper.
6 Q You would look at, I'm sorry?
7 A Well, you would know.
8 Q Feed me on that, I'm not sure actually what you did?
9 A You have -- newspaper are seldom looked at physically,
10 they are mostly on microfilm. And most of the major
11 newspapers have indexes so that you can do a word search or
12 topic search and find information.
13 And in this instance, I already knew the major
14 events that were being reported on in the 1950's and '60's
15 either from private scientific groups or from the
16 government, and I would then look, sometimes if the paper
17 is on microfilm you just scan to those dates or you can use
18 an index.
19 Q And approximately how many major items did you examine
20 from '50 to '65?
21 A I really don't know how many, but I would have
22 examined all of the ones which appeared in connection with
23 some of these reports that we have been talking about.
24 Q You would have looked at the numbers after the Wynder
25 report for one thing, I'm assuming?

731

Cross - Hoff

1 A Yes.
2 Q And after the Surgeon General's report, I'm assuming?

3 A Not after but at that --
4 Q At that time and place?
5 A Yes.
6 Q And items of that type of seriousness, is that what we
7 are talking about?
8 A Yes. And again, as you look through these stories and
9 papers, sometimes you will come across cartoons that
10 accompany them or editorial accounts, but primarily you are
11 looking for the newspaper coverage per se.
12 Q So it is my understanding that you did not endeavor to
13 see what was coming out day by day in any city?
14 A No, I mean, it would be physically and mentally
15 impossible to do that.
16 Q So you wouldn't want us to look at any of these
17 newspaper articles and consider that they were a steady,
18 daily diet for any city to receive, would that be fair?
19 A I think, yeah, that would be fair on these scientific
20 reports.
21 You have to keep in mind that these newspaper
22 were also publishing columns about health issues related to
23 tobacco use and cigarettes, so those would have appeared as
24 well on days other than when the reporting was going on
25 about these major studies.

732

Cross - Hoff

1 Q But a in good conscience you can't personally say that
2 regarding a paper doing that if you didn't examine it?
3 A That's right. For example, this Akron paper, the
4 journal had what was unusual, when I compared it to other
5 papers I had looked at. It had dentists running regular
6 columns, if not daily, weekly, about smoking and cancer of
7 the mouth or lip cancer, associated with not so much
8 exclusively lung cancer, but they spoke about it. But.
9 They were concerned about cancer of the mouth
10 from smoking, and that was a little unusual because I
11 hadn't run into columns by dentists, let's say in the
12 Indianapolis Star or some of the California papers that I
13 looked at.
14 Q But in fairness, I believe from what you said earlier,
15 you were looking at the papers in the area where these
16 events occurred, and those would have been the papers
17 wherein you would have found a reference by a dentist, for
18 instance, speaking to cancer?
19 A Yes. But as I would notice that I would usually look
20 to see if it was a weekly column or not.
21 Q Sure, I believe you. But you wouldn't be able to
22 determine what he had reported on in any other weeks by
23 looking at what he was talking about when the Surgeon
24 General's report came out on cancer and smoking, right?
25 A I didn't understand that question.

733

Cross - Hoff

1 Q Sure. If the dentist had 52 columns a year, for
2 instance?
3 A Right.
4 Q By your looking at his column or her column that was
5 written at the time the Surgeon General's report came out
6 you couldn't, in good conscience, predict what was in that
7 dentist's other 51 weeks of columns?
8 A No.
9 Q I believe that you are aware -- excuse me one second,
10 please.
11 If I may be excused for a moment, your Honor.

12 May I go forward?
13 THE COURT: You want to show her a particular --
14 go ahead.
15 MR. SMITH: Before I read it.
16 THE COURT: Please.
17 THE WITNESS: Okay. I've read it.
18 MR. SMITH: May I put this on the screen, your
19 Honor.
20 THE COURT: No, just.
21 MR. SMITH: Read from it here?
22 THE COURT: Put it to her as a question.
23 BY MR. SMITH:
24 Q Dr. Hoff, it is my understanding that you are familiar
25 with Bad Habits by Burnham, is that correct? I think he was
734

Cross - Hoff
1 a professor at Ohio State. You've also had --
2 A Yeah, that's, I think you told me that, I wasn't aware
3 that he was at Ohio State. I think you mentioned it in the
4 deposition.
5 Q Yes, I think you indicated you were aware of him?
6 A I read the book, yes.
7 Q And I thought, I believed you that that -- I was the
8 one that threw Ohio State into it. I'm sorry.
9 A Okay.
10 Q But you were aware when you read the book when we
11 discussed it, right?
12 A Yes.
13 Q Incidentally, your current residence is where?
14 A I'm living right now in Montana. I'm on leave, a
15 research leave from Ohio University.
16 Q And that's for, is this the first year or the second
17 year of Montana?
18 A I just moved there this summer. I've had a home there
19 that I used for vacation purposes.
20 Q And you grew up there?
21 A Yeah, I'm from there. Its God's country.
22 Q Ski country, too. And the year before you were at?
23 A I had a fellowship at the College of William and Mary.
24 Q And you were there for a year?
25 A A year writing a book, yes.

735

Cross - Hoff
1 Q This is the paragraph I would like to read to you.
2 It's in the smoking chapter of the book entitled Bad Habits
3 by Burnham.
4 "As the economic importance of the industry
5 grew, other elements in American society deferred to
6 tobacco industry interests. Both in the local economy and
7 as a major means by which government's at state and federal
8 levels raised revenue. Tobacco carried much weight in
9 society and biased governmental officials just as alcoholic
10 beverage taxes did.
11 "By the 1960's over \$3 billion in taxes from
12 tobacco were collected each year and the stake that other
13 industries had in tobacco from farming publishing and
14 advertising was notorious.
15 "In 1964, for example, after the Surgeon General
16 condemned cigarette smoking, the tobacco industry in
17 imposing any warnings and cigarette ads lined up support
18 from the American Newspaper Publishers Association, the
19 Advertising Federation of America, the Association of
20 National Advertisers, the Radio Advertising Bureau and the

21 National Association Of Broadcasters, as was the case with
22 alcoholic beverages.

23 "Americans with many different viewpoints over
24 the years developed and maintained a substantial interest
25 in furthering the consumption of tobacco products. This

736

Cross - Hoff

1 interest was greatly complicated as tobacco firms
2 diversified and acquired many unrelated businesses in the
3 last part of the century."

4 Would you agree with that statement?

5 A It's interesting that's the paragraph you chose to
6 select from the book. Because when we talked about it at
7 the deposition --

8 THE COURT: The question is whether you agree
9 with it or do not agree with it.

10 THE WITNESS: No, I don't. Because the book has
11 been criticized for exactly that simplistic point of
12 view with respect to the influence of economic
13 interests on the society in general or on the culture
14 in general. And so while I like the book for its
15 social history in terms of economic history, if you
16 read reviews of the book you will see in the Journal
17 of Social History it was criticized for this
18 simplistic monolithic view of how companies, or firms,
19 functioned in society and how they influence the
20 society. So that part of Burnham's book is the
21 weakest portion of it.

22 So I can't agree. It you look at the
23 documentation it says it lined up these organizations;
24 it doesn't say what they were lined up to do. The
25 documentation there is practically non-existent for

737

Cross - Hoff

1 that paragraph in the historical terms, so it's the
2 weakest part of the book. That is his economic
3 theories are.

4 Q He is taking a position that economic interests were
5 too important to the -- were not that important to the
6 tobacco industry or he's saying they were too important or?

7 A Well, he's trying to show, even though in the first
8 part of book he's showing the complex way in which
9 cigarettes became a cultural symbol and represented many
10 things in the society, the consumer society, the
11 industrialized society even reflected to a certain degree
12 womens liberation in the '20's, but when he backs off and
13 starts to talk in very general terms, as he does in that
14 paragraph about the dominant influence of the tobacco
15 industry over other agencies and groups in the society, he's
16 over stressing his case and under proving it.

17 And it just happens to be that that's the
18 portion of the book which was most widely criticized in, I
19 think, all of the reviews I read.

20 Q Would you agree with him with the exception of the
21 degree to which he goes?

22 A I can't, because that particular paragraph is if -- I
23 don't remember seeing there may be one footnote cited, but
24 there are not footnotes that would document his general
25 statements in that paragraph.

738

Cross - Hoff

1 Q And your experience would lead you to conclude
2 otherwise?

3 A On this point of economic influence. I did a major
4 economic foreign policy study on the 1920s where they, the
5 interpretation within the history profession was that the
6 business community dictated our policy on recognition of the
7 Soviet Union, we didn't recognize if Soviet Union until
8 1933, and by going back in the business records I found that
9 that wasn't true. That you have to look at those records
10 you have to look at the lobbying the companies do, and it
11 simply didn't pan out.

12 So that when you make economic statements about
13 companies doing this or that or influencing this or that
14 you really have to do very serious detailed economic
15 research. And the problem with some social historians is
16 that they are not trained in the traditional fields of
17 politics and economics, as I happen to have been when I
18 started out as a traditional historian.

19 And that's Burnham's weakness, he doesn't have
20 an economic background.

21 Q You are not saying, I take it that there are no
22 influences that can be exerted, other than those through
23 lobbying?

24 A No, I would never make that kind of comprehensive
25 statement, no.

739

Cross - Hoff

1 Q And I believe you are also not saying that lobbying
2 doesn't exert influence?

3 A True. Lobbying can influence, but again, it's -- my
4 expert testimony here is about common knowledge, and
5 lobbying the Congress is not necessarily going to be
6 reflected in the information that's making up the average
7 person's awareness of about a certain topic or subject.

8 Q Well, let me ask you this question, Dr. Hoff.

9 The tobacco industry's interest would be in the
10 American public believing what about the linkage between
11 smoking and lung cancer?

12 MR. COFER:Objection, calls for speculation.

13 THE COURT:Overruled.

14 THE WITNESS:Repeat the question, please.

15 MR. SMITH:Yes, ma'am.

16 THE COURT:Read the question back. I don't want
17 to have it restated.

18 I'll read the question. The question is:

19 The tobacco industry's interest would be in the
20 American public believing what about the linkage
21 between smoking and lung cancer?

22 THE WITNESS:Would you read it again, I'm really
23 not clear.

24 THE COURT:Let me state it. Based on your
25 research.

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Cross - Hoff

1 THE WITNESS:Yes.

2 THE COURT:Do you have an opinion as to the
3 position of the tobacco industry, and in particular
4 these four defendants, with respect to providing
5 knowledge and information to the general public that
6 there was a linkage between smoking tobacco and lung
7 cancer?

8 THE WITNESS:I guess the answer would be no,
9 because I didn't study the tobacco companies
10 themselves in this time period.

11 THE COURT:Thank you.

12 BY MR. SMITH:
13 Q Let me ask you this question to see if one of the
14 document?
15 THE COURT:Let me ask another question.
16 In determining the question of whether there
17 was a common knowledge, as you were requested to do
18 it, did you do any research with respect to what the
19 tobacco companies were telling the general public
20 about the linkage, or lack of linkage, between smoking
21 and lung cancer?
22 THE WITNESS:Only to the degree their statements
23 would have been in these newspaper articles; that, and
24 national magazine articles that we have gone over.
25 THE COURT:And did you find anything in your

741

Cross - Hoff

1 research that indicated the tobacco companies were
2 conceding, with respect to the issue of common
3 knowledge, that there was in fact a linkage between
4 smoking cigarettes and lung cancer?
5 THE WITNESS:That they were conceding this
6 publicly?
7 THE COURT:Yes.
8 THE WITNESS:Obviously I ran across statements
9 where they were asking for more studies.
10 THE COURT:That wasn't my question. Did they
11 concede the linkage, in your research, did you find
12 any tobacco company or official conceding that there
13 was a linkage between smoking tobacco and lung cancer?
14 THE WITNESS:They conceded that the studies --
15 THE COURT:No, no, no.
16 MR. COFER:May I approach, your Honor.
17 THE COURT:My question is: Did they concede the
18 fact that there was in truth a linkage between smoking
19 and lung cancer?
20 THE WITNESS:In their public statements?
21 THE COURT:Yes. In their public statements.
22 Did they agree that there was in fact this linkage
23 between smoking and lung cancer?
24 THE WITNESS:All I can say is they expressed
25 concern over the fact that the linkage had been raised

742

Cross - Hoff

1 by these studies.
2 THE COURT:You don't want to answer my question?
3 THE WITNESS:I'm answering it.
4 THE COURT:My question is concede, not that
5 they, that they recognized there was a controversy.
6 Did they agree that there was a linkage between
7 smoking and lung cancer?
8 THE WITNESS:No more than some of the scientists
9 in the period that we are studying.
10 THE COURT:Thank you, next question.
11 I gather though, that their position with
12 respect to this issue was a matter that you considered
13 when you examined the question of common knowledge?
14 THE WITNESS:Very definitely, from their public
15 statements.
16 THE COURT:Thank you.
17 BY MR. SMITH:
18 Q Dr. Hoff, would it be true in the articles that you
19 pulled out that there were statements made by the tobacco
20 industry that more research was needed?

21 A Yes, I recall some.
22 Q Were there statements, and I'm going to --
23 MR. COFER: May we approach, your Honor.
24 (A discussion was conducted at the sidebar, off
25 the record.)

743

Cross - Hoff

1 (A discussion was conducted at the sidebar, out
2 of the hearing of the jurors, as follows:)
3 MR. COFER: The thing I wanted to bring to the
4 court's attention, because I wanted to make sure I
5 didn't waive an objection based on prior pretrial
6 rulings, is the portion that Mr. Smith wants to read
7 refers specifically to the TIRC and the Tobacco
8 Institute. Reference to those organizations have been
9 excluded from the case.
10 THE COURT: They are no longer excluded, not
11 given her testimony and the limited nature of her
12 research which she has indicated no interest in what
13 the tobacco companies had to say as a part of
14 research. And I am going to let him proceed with
15 those paperworks, and your objection is overruled.
16 MR. COFER: Thank you.
17 MR. SMITH: Thank you.
18 (The following proceedings were conducted
19 in open court.)
20 BY MR. SMITH:
21 Q Dr. Hoff, I would like to direct your attention to one
22 of the --
23 MR. SMITH: May I approach the witness, your
24 Honor.
25 THE COURT: Yes.

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Cross - Hoff

1 BY MR. SMITH:
2 Q Dr. Hoff, I would like to read to you from the
3 Cincinnati Enquirer for July 13th, 1957, page 2. And this
4 is taken from one of the reliance materials that you
5 provided to us?
6 A Um-hum.
7 Q The beginning of the article, it starts off with:
8 Causes Cancer, question mark. And then it says: "Official
9 ads voiced in cigarette study. " And it was Surgeon General
10 Burney saying that "there is increasing evidence that excess
11 cigarette smoking is one of the causative factors of lung
12 cancer."
13 Burney said, "the public health service favors
14 more research to identify and try to eliminate these
15 factors." He said, "it is clear that heavy and prolonged
16 cigarette smoking is not the only cause of lung cancer,"
17 okay? And that's what the public would see insofar as it
18 being related.
19 And then it's immediately followed by, in New
20 York, Dr. Clarence C. Little, Chairman of the Scientific
21 Advisory Board to the tobacco in New York.
22 Doctor Clarence C. Little, Chairman of the
23 Scientific Advisory Board to the tobacco industry research
24 committee said, "Burney's statement adds nothing to what
25 has been known about the cause of lung cancer. It reflects

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Cross - Hoff

1 the opinions of some statisticians and the relatively few
2 experimental scientists who have actively charged that

3 cigarette smoking is a cause of lung cancer," Little said.
4 Do you recall seeing that?
5 A I vaguely recall statements like that, yes.
6 Q Can you tell us who the Tobacco Research Committee
7 was, please?
8 A It was a group put together by the tobacco industry
9 following the Wynder & Graham mouse study.
10 MR. SMITH: May I approach the witness with
11 these, your Honor?
12 THE COURT: Do you have a series of those you are
13 going to present to the witness?
14 MR. SMITH: Yes, sir.
15 THE COURT: We'll take about a five minute break.
16 We'll call for you as soon as are ready.
17 (The jury was returned to the courtroom and
18 the following proceedings were conducted in open
19 court.)
20 THE COURT: Please be seated.
21 You may continue.
22 BY MR. SMITH:
23 Q Dr. Hoff.
24 A Yes.
25 Q I would like to direct your attention, please, to the

746

Cross - Hoff

1 Frank statement?
2 A Yes.
3 Q And that is the copy you have has Cleveland Plain
4 Dealer, January 4, 1954?
5 A Yes it does.
6 Q And we've marked that Plaintiff's Exhibit 8800 but it
7 is a duplicate of Plaintiff's Exhibit 2072, but this is your
8 copy?
9 A Yes.
10 Q You are familiar with the Frank statement, is that
11 correct?
12 A Yes, I am.
13 Q Are you familiar with the fact that there was a
14 meeting of the presidents of the tobacco companies in late
15 1953 that led to this?
16 MR. COFER: Objection your Honor, beyond the
17 scope.
18 THE COURT: Overruled.
19 THE WITNESS: No, I haven't researched tobacco
20 company documents.
21 BY MR. SMITH:
22 Q And you have no information of what triggered the
23 frank statement?
24 A Yes. As I said earlier, it was triggered by the mouse
25 reports.

747

Cross - Hoff

1 Q And after the mouse reports came out, was there
2 another event occurred, a meeting with the tobacco people
3 before they issued this statement?
4 A I don't know.
5 Q One way or the other.
6 The people that issued this statement are set
7 forth at the bottom as the tobacco industry research
8 committee, is that correct?
9 A Yes.
10 Q And the names of those -- or withdraw that.
11 I won't put you through all that. It will be on

12 the document.
13 But there are 14 companies listed there is that
14 correct?
15 A I'll take your word for 14, yes.
16 Q And do the four defendants in this case appear there?
17 A I believe they do, yes.
18 Q Or I withdraw that. I misled you, not intentionally.
19 One does not. Liggett is not there?
20 A Liggett is not there.
21 Q Philip Morris is there, is that true?
22 A Yes.
23 Q Lorillard?
24 A Yes.
25 Q American Tobacco?

748

Cross - Hoff

1 A Yes.
2 Q And it's signed those three companies, it is signed
3 with their president's signature underneath it, or something
4 replicating their signature, is that correct?
5 A Yes.
6 Q And would you read the first paragraph to us, please?
7 A Okay, I'll try.
8 Q Or the title, I guess, the beginning?
9 A Well, the headline for this ad, it's an advertisement,
10 is a Frank Statement to Cigarette Smokers.
11 Q And I would like to stop there for one moment. When
12 the word frank is used, what does that connote to a
13 historian when it sees that in a document?
14 A Well, in this case I had to read when I first came
15 across it, which was years ago. You have to read it a
16 couple of times. You don't know if it means candid or name
17 of a person. And in this case it means, the interpretation
18 that I gave it was that this was supposed to be a
19 straightforward statement.
20 Q Candid statement?
21 A Candid statement.
22 Q And the first paragraph of that document reads what?
23 A "Recent reports on experiments with mice have given
24 wide publicity to a theory that cigarette smoking is in some
25 way linked with lung cancer in human beings."

749

Cross - Hoff

1 Q The next paragraph?
2 A And you want me to continue reading?
3 "Although conducted by doctors of professional
4 standing, these experiments are not regarded as conclusive
5 in the field of cancer research. However, we don't believe
6 that any serious medical research, even though its results
7 are inconclusive, should be disregarded or lightly
8 dismissed."
9 Continue?
10 Q Yes, please?
11 A "At the same time we feel it is in the public's
12 interest -- in the public interest to call attention to the
13 fact that eminent doctors and research scientists have
14 publicly questioned the claimed significance of these
15 experiments. Distinguished" -- and then it starts a new
16 paragraph and says.
17 "Distinguished authorities point out," and then
18 it lists a number.
19 Q If I might ask this, if we could. This part starts in
20 bold print, is that correct?

21 A I can't tell from my copy. You mean the part I'm
22 going to read now? It looks like it, yes, yeah.
23 Q Thank you.
24 A Continue to read?
25 Q Yes, please?

750

Cross - Hoff

1 A All right. So it's beginning to list these points
2 now: That "medical research of recent years indicates many
3 possible causes of lung cancer.
4 "Number 2, that there is no agreement among the
5 authorities regarding what the cause is.
6 "Number 3, that there is no proof that cigarette
7 smoking is one of the causes.
8 "Four, that statistics purporting to link
9 cigarette smoking with a disease could apply with equal
10 force to any one of many other aspects of modern life.
11 Indeed the validity of the statistics themselves is
12 questioned by numerous scientists."
13 Q The next paragraph, please?
14 A "We accept as" -- I'm having trouble with the words
15 here. "We accept" -- here we go.
16 "We accept an interest in people's health as a
17 basic responsibility paramount to every other consideration
18 in our business."
19 Q And the next paragraph?
20 A "We believe that the products we make are not
21 injurious to health."
22 And then the next.
23 Q That's a pretty straightforward paragraph to a
24 historian, please?
25 A It is if one places it in context. What I've read up

751

Cross - Hoff

1 to this point is what you would also have read in the
2 newspaper accounts of these studies. Hammond & Horn were
3 saying that more studies needed to be done to prove this
4 conclusively. So this is in keeping with the state of art
5 of the reporting on the scientific studies.
6 Q May I ask you this, Dr. Hoff.
7 Those four, you are talking about the four
8 bullets?
9 A I'm talking about the entire thing I have just read,
10 including the four bullet points.
11 Q Let me ask you just to focus on the four bullet
12 points.
13 Did you read any other articles where those four
14 bullet points were put together in that fashion?
15 A Probably not in that specific fashion, because this is
16 an advertisement.
17 MR. COFER:Counsel, would you please read the
18 statement above the four bullet points.
19 MR. SMITH:We read them all.
20 MR. COFER:I don't think the doctor read that.
21 MR. SMITH:If I can go forward we can come back.
22 That was read. I had her read all 3 paragraphs.
23 THE COURT:She read every word.
24 MR. COFER:I'm sorry, I missed that.
25 THE WITNESS:Yes, I did.

752

Cross - Hoff

1 BY MR. SMITH:
2 Q You say it was for advertising, it was a big ad in the

3 New York times for one place, wasn't it?
4 A It appeared in over 400 newspaper on this one day.
5 Q Was the full page ads in the New York times one of
6 them, please?
7 A Yes, it was. And I don't know if the jury can see
8 this, but you really do have to read into this to get any
9 indication of what it is about. And it isn't a great ad, I
10 don't think, if you wanted to attract attention to it.
11 Because it requires quite a bit of reading into the text.
12 Q You wouldn't put much truck in it?
13 A I wouldn't say that. It's an ad, and compared to
14 other ads with pictures or with dramatic kinds of captions,
15 it's fairly dull, and a reader would have to read it or the
16 average person would really have to read this text to
17 understand what's being said.
18 Q Let me ask you this question. Being a historian and
19 having a doctor's degree and had a lot of different roles in
20 life, would that be a fair statement? You are a
21 sophisticated person?
22 A Okay.
23 Q Would that be fair?
24 THE COURT:I don't think she's required to
25 answer whether she's sophisticated.

753

Cross - Hoff

1 MR. SMITH:I withdraw it.
2 Q Here is my question to you. From your reading of that
3 article, was there any doubt in your mind as to the position
4 the tobacco industry was taking?
5 A As of 1954 it was in keeping with much of the
6 reporting on these studies.
7 Q So it is a an appropriate position for them to say,
8 for instance, we believe the products we make are not
9 injurious to health. You think that was an appropriate
10 statement for them to make after the Wynder studies?
11 A I really can't comment on the appropriateness of the
12 statement. I think in light of the Wynder study and the
13 inconclusiveness of some of the statistics of these reports
14 which these scientists themselves were commenting on, it was
15 a position that a maker of cigarettes would take. But I'm
16 not sure how appropriate it was. Because a value judgment
17 on my part.
18 Q Anything further on that, I'm sorry?
19 A The only thing, I've studied this a lot and I, quite
20 frankly, think that the average reader would not have looked
21 at the text because it just required too much reading and
22 too little enticement to read it.
23 Q Pretty ineffective ad?
24 A Well, it was a one day ad. Who knows how effective it
25 was.

754

Cross - Hoff

1 Q If you would please read the next paragraph?
2 A We always have and always will cooperate closely with
3 those whose tasks it is to safeguard the public health.
4 Q And the next paragraph?
5 A "For more than 300 years, tobacco has given solace,
6 relaxation, and enjoyment to mankind. At one time or
7 another during those years critics have held it responsible
8 for practically every disease of the human body. One by one
9 these charges have been abandoned for lack of evidence."
10 Continue?
11 Q Yes, please.

12 A "Regardless of the record of the past, the fact that
13 cigarette smoking today should even be suspected as the
14 cause of a serious disease is a matter of deep concern to
15 us. Many people have asked us what we are doing to meet the
16 public's concern aroused by the recent reports. And here is
17 the answer."

18 And then you have three points being made.

19 "We are pledging" --

20 Q This would be with a 1?

21 A Yeah, "Number 1. We are pledging aide and assistance
22 to the research effort," I can't read that word. Can you
23 read it?

24 Q I believe my copy?

25 MR. COFER:Into.

755

Cross - Hoff

1 A All right. "Into all faces of tobacco use and health.
2 The joint financial aid will of course be in addition to
3 what's already being contributed by individual companies.
4 For this purpose we are establishing" --

5 BY MR. SMITH:

6 Q This would be number 2, right?

7 A "Number 2. For this purpose we are establishing a
8 joint industry group."

9 THE COURT:Consisting.

10 THE WITNESS:Consisting.

11 BY MR. SMITH:

12 Q Initially?

13 A "Initially of the under."

14 THE COURT:Undersigned.

15 MR. SMITH:Want me to give you a better copy?

16 THE WITNESS:Yeah.

17 A "For this purpose we are establishing a joint industry
18 group consisting initially of the undersigned. This group
19 will be known as the Tobacco Industry Research Committee.
20 "In charge of the -- this is number 3. "In charge of the
21 research activities of the committee will be a scientist of
22 unimpeachable integrity and national reputation. There will
23 be a advisory board of scientists disinterested in the
24 cigarette industry. A group of distinguished men from
25 medicine, science and education will be invited to serve on

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Cross - Hoff

1 this board. These scientists will advise the committee on
2 its research activities."

3 And then the final statement is, this statement
4 or final words are. "This statement is being issued
5 because we believe the people are entitled to know where we
6 stand on this matter and what we intend to do about it."

7 BY MR. SMITH:

8 Q Thank you.

9 The next one I would like to ask you to read
10 from is what you've, you selected in your to support, you
11 selected as a reliance material, and it's from, I believe
12 that's the New York Daily News?

13 A Daily News, this one is, yeah.

14 Q April 15th, 1956, page 26?

15 A Um-hum.

16 Q If you would please read mt starts off at the top it
17 says, "isolate small cancer factor in cigarette tar."

18 MR. COFER:Excuse me, Russ, where is this?

19 MR. SMITH:Yes, sir. Here.

20 THE COURT:It's the last page of what you have

21 been handed.
22 MR. NANCE:Exhibit Number?
23 MR. SMITH:8801.
24 Q It concludes with this, wants more information, do you
25 see that sort of headline there or, you know, topic line?

757

Cross - Hoff

1 A Okay. A subhead, yes.
2 Q Subhead, I'm sorry?
3 A Yes.
4 Q If you would read what that says, please?
5 A This is at the end of the article, so anyone reading
6 it would have had to finish the article.
7 Subhead is "Wants More Information. Timothy V.
8 Hartnett, Chairman of the Tobacco Industry Research
9 Committee said yesterday that reports from Atlantic City
10 linking animal cancer to tar recovered from tobacco do not
11 warrant conclusions on the causes of human lung cancer.
12 Although the findings contribute to the to the study of
13 this complex subject Hartnett said, much more information
14 is needed. He said that the tobacco industry will continue
15 to support research by independent scientists to get the
16 facts about tobacco use and health. Thus far the industry
17 has allocated \$1.5 million."
18 BY MR. SMITH:
19 Q Dr. Hoff, based on the numerous papers that you've
20 looked at on this topic and the fact that you have testified
21 in three other cases?
22 A Yes.
23 Q And you've been involved in how many others,
24 approximately?
25 A Just those three.

758

Cross - Hoff

1 Q The only ones you were involved in went to trial?
2 A Yes, I was involved in one that didn't go to trial.
3 Q And your involvement has been with the representing or
4 testifying or being requested to review and examine the
5 material by the tobacco companies, is that correct?
6 A Yes, on the subject of common knowledge.
7 Q And you've testified as an expert witness and were
8 called to the stand by them?
9 A Yes.
10 Q And I'm sure during the course of that you've had
11 access to any material you wanted to review, would that be a
12 fair statement, within reason?
13 A I think so. Any material I requested to be supplied
14 to me, yes.
15 Q Did the attorneys supply you with material over time?
16 A Initially my graduate students did.
17 Q And then afterwards?
18 A At times the attorneys would supply, depended on where
19 I was. If I were in Indiana University with a legion of
20 graduate students, they provided the bulk of the
21 information. At Ohio University I had graduate students
22 that helped me at William and Mary. Last year I didn't. So
23 it would depend on my own situation. Because full
24 professors normally use graduate students to collect
25 information for them on any topic they are searching.

759

Cross - Hoff

1 I hate to disabuse the audience of the fact that
2 we can always conduct our own research. We direct it, but

3 we can't conduct it.
4 Q The research you received or the papers you received
5 basically would have come from research, I mean students, or
6 from the attorneys representing the tobacco companies?
7 A Yes, after I advised them what I was looking for.
8 Q In all the papers that you saw, did you ever see the
9 tobacco industry or the tobacco companies ever change their
10 position that more research was needed?
11 A In this time period?
12 Q In any time -- in this time period for one, but have
13 you ever seen anything to that extent? Ever see it happen?
14 A Probably not in the sense they were consistent in
15 asking for further research.
16 Q And did you -- or withdraw that it's been covered.
17 I would like to please go to Exhibit 8802, which
18 is a paper you supplied as a reliance document from the
19 Cincinnati Enquirer dated June 7, 1955. It's page 19?
20 A Right. I have it.
21 Q If you would please read the last paragraph to us?
22 A Again, this is the last paragraph of a long article.
23 The headline of which --
24 Q And forgive me. In fairness to you, and you have used
25 that as a point to indicate that the public this wouldn't

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Cross - Hoff

1 have as much impact on the public?
2 A That's true, because it appears at the end of the
3 public -- the reader would read the headline and first
4 couple of paragraphs. Normally, unless it is an unusual
5 average reader.
6 In the last paragraph, which is a repeated in a
7 lot of articles I looked at, they quote in the last
8 paragraph the representative of the tobacco industry. And
9 this says a spokesman for the tobacco industry declared
10 that the American Cancer Society study did not establish,
11 did not quote establish a cause and effect. I think that's
12 a typo. Cause and effect relationship between cigarettes
13 and lung cancer. And said the statistical study ignored
14 many factors which might affect disease and longevity.
15 And this was from 1955 on page 19 which meant
16 the reader would have had to have gone to page 19 to read
17 it.
18 Q In all the papers that you reviewed on this topic that
19 were supplied to you, either at your requests or the
20 graduate students or through lawyers, did you ever see any
21 papers that indicated whenever anything came out by, from a
22 scientific article, tying cigarette smoking to lung cancer
23 that she should prepare a response to diminish the impact or
24 to create doubt or create confusion or to keep the
25 controversy going, did you ever see anything to that effect?

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Cross - Hoff

1 THE COURT:I don't know that you have defined
2 who these they is counselor.
3 MR. SMITH:I'm sorry, your Honor.
4 Q Either the people who were in charge of the Tobacco
5 Industry Research Committee, or the people who were in
6 charge of the Tobacco Institute, or any of the tobacco
7 companies.
8 Did you ever see anything along that line, first
9 off?
10 A Along the lines of -- just repeat it for me.
11 MR. SMITH:Yes, ma'am.

12 THE COURT:Why don't you restate the question,
13 it was a pretty prolonged question, and I think in all
14 fairness to the witness you should restate it.
15 MR. SMITH:I'll try to do a better job.
16 Q Did you ever, with respect to these particular
17 entities we are talking about, in the papers you examined,
18 did you ever see one that indicated that it was a goal or it
19 was desirable or that they wanted to keep the controversy
20 going? Or to create doubt, or to challenge whatever new
21 science came up linking smoking to lung cancer?
22 A Well, you are asking several questions there.
23 THE COURT:It is a pretty compound question. I
24 don't think it's fair to the witness.
25 MR. SMITH:I'm sorry.

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Cross - Hoff

1 Q Did you ever see any articles?
2 THE COURT:Break it down so that it's more
3 understandable.
4 MR. SMITH:Yes, sir.
5 Q Dr. Hoff, did you ever see any articles from those
6 groups?
7 THE COURT:See those groups again, we have a
8 problem. I'll tell you what, it's 12:00 o'clock, you
9 are tired, she's tired, I'm tired, the jury is tired.
10 We are going to take the recess at this time. We'll
11 start at 1:00 o'clock.
12 MR. SMITH:Yes. Thank you, your Honor.
13 (Luncheon recess.).
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1 IN THE DISTRICT COURT OF THE UNITED STATES
2 FOR THE NORTHERN DISTRICT OF OHIO
3 JOCELYN TOMPKIN, ETC., ET AL.,)
4 Plaintiffs,) Judge David D. Dowd, Jr.
5 vs.) Akron, Ohio
6 AMERICAN BRANDS, INC., ET AL.,) Civil Action
7 Defendants.) Number 5:94CV1302
8 - - - - -
9 TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE
10
11 THE HONORABLE DAVID D. DOWD, JR.,
12
13 JUDGE OF SAID COURT, AND A JURY
14

ON THURSDAY, SEPTEMBER 27, 2001.

VOLUME 4-PM

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AFTERNOON SESSION

(Jury in).

THE COURT: Please be seated.

Please continue.

CROSS-EXAMINATION OF JOAN HOFF (RESUMED)

BY MR. SMITH:

Q. Dr. Hoff, in your time that you have been involved in your research regarding the history of this issue and looking at the various papers that you have seen, have you come across any papers from either the Tobacco Institute or the Tobacco Industry Research Committee, or the Council for Tobacco Research, or any Hill & Knowlton documents, a public relations firm --

A. You mean internal documents from these groups?

Q. Well, they might be, or they could be external, but I think there is a good chance they would be internal, but I can't, in all good conscience, say they wouldn't be external either.

A. No is the answer. I have -- as I said, I haven't looked at internal documents because it doesn't relate to common knowledge.

Q. Have you ever come across -- withdraw that.

You have seen documents from the tobacco companies?

A. I've only cursorily searched the Internet in looking

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at some of these documents, but they weren't -- I didn't include any of them in my research because I'm here to talk about common knowledge, and private documents do not affect common knowledge.

Q. And let me ask you this question: Have you ever come across the word "Controversy" in your work in these cases?

A. Of course.

Q. Have you ever come across the concept or the phrases that any of the tobacco companies or any of these other entities that I mentioned, Tobacco Institute, Tobacco Institute Research Committee, Council for Tobacco Research, wanted to do things to keep the controversy going?

A. I think you referred to that earlier, and I think my answer was -- was controversy was used by practically everybody who wrote about or did these scientific studies on tobacco in this time period.

So controversy was a common word.

The scientists themselves on either side of the issue used it. So the -- I don't know -- controversy is there, in the material I looked at that was having an impact on common knowledge.

Q. And the controversy existed in the exhibits that we looked at just a little bit ago where the top part of the argument -- of the article would indicate there was a problem, and the bottom would indicate we needed more

Hoff - Cross

1 research?

2 A. Right.

3 But I think your question was that, to back
4 up, was whether or not this was a deliberate attempt by the
5 tobacco representatives of industry to keep the controversy
6 going.

7 And the answer to that question is no,
8 because the controversy existed, generally speaking, in the
9 public pronouncements on this subject, whether it came from
10 the scientists or the tobacco industry or from individuals
11 who were interviewed on the subject.

12 Q. Let me ask you this question, so that I'm clear what
13 you just said, Dr. Hoff.

14 Did you just -- or let me ask you something,
15 if you are saying this. Are you saying that it is your
16 opinion that the tobacco companies were not attempting to
17 keep the controversy going?

18 Do you have -- is that your opinion?

19 A. You're asking me a question that is outside of my
20 area of expertise, because to answer that, one way or the
21 other, one would have had to have examined, I guess, these
22 internal documents you seem to be referring to, which I
23 didn't.

24 Q. So then you are telling me you do not have an opinion
25 as to whether or not the tobacco companies were attempting

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Hoff - Cross

1 to keep the controversy going?

2 A. I have this opinion: That to the degree that
3 scientists --

4 Q. If I might just ask you, because I really, I'm on a
5 time clock, and when I run out of 1200 minutes, I may be
6 done.

7 So my question to you is this: Can you
8 answer that yes or no; do you have an opinion as to whether
9 or not the tobacco industry or any of its companies were
10 attempting to keep the controversy going?

11 A. No.

12 Q. Okay. You don't have an opinion one way or the
13 other?

14 THE COURT: That's what she said.

15 MR. SMITH: Okay. Thank you.

16 Q. Let me ask you this question: Have you ever heard of
17 the Tobacco Institute?

18 A. Yes.

19 Q. And would you tell us, please, what the Tobacco
20 Institute is?

21 A. Again, it was an organization or an entity put
22 together by the tobacco companies to basically fund -- in
23 some cases fund research or publicize the position of the
24 tobacco companies.

25 Q. Did you think that the Tobacco Institute was doing

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Hoff - Cross

1 research? Did someone indicate that to you?

2 A. No. I'm trying -- I'm thinking of the research
3 council itself, but the institute was a, I think, a more
4 ambiguous entity that was created by the industry.

5 Q. Would you agree that the Tobacco Industry Research
6 Committee started out doing both public relations of
7 lobbying and had a research function originally?

8 A. I didn't research the activities of that council, no.
9 Q. Okay. But it is your belief that at least one of the
10 things that Tobacco Institute did was lobbying, is that
11 correct?
12 A. No, you asked me -- you didn't ask me about lobbying.
13 I don't know if they did lobbying.
14 Q. Did they do public relations?
15 A. I think they did some PR work because they are quoted
16 in some of these statements.
17 Q. Did they issue press releases?
18 A. As far as I know, they did, yes.
19 Q. Did you ever see any of their press releases?
20 A. Only as they might have been reported on in this mass
21 media material.
22 Q. And the mass media material that you saw in the year
23 1961, did you see any material in the mass media that would
24 support there being a press release issued by the Tobacco
25 Institute wherein George V. Allan, the president of the

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Hoff - Cross

1 Tobacco Institute, said "The tobacco industry has an
2 obligation to see that the public is not hoodwinked."
3 Mr. Allan said "We must learn to distinguish
4 the real facts about tobacco from unjustified emotional
5 campaigns based on the health scare technique, a technique
6 that was not successful 100 or 300 years ago, and we are
7 confident will not be successful today."
8 Do you recall coming across that statement?
9 A. I don't recall that.
10 MR. COFER: Excuse me. Your Honor, may I
11 have a continuing objection to the Tobacco Institute
12 questions and the TIRC --
13 THE COURT: Very well, have a continuing
14 objection.
15 MR. COFER: Thank you.
16 THE COURT: Which is overruled.
17 Q. In the year 1959, do you recall seeing any newspaper
18 articles or being made aware of any press release by the
19 Tobacco Institute that said -- or it was by, first off, at
20 that time James P. Richards, president of the Tobacco
21 Institute, in response to requests for comments on an
22 anti-smoking resolution now before the American Public
23 Health Association in Atlantic City, quote, "The American
24 Public Health Association resolution is obviously the
25 result of another effort by the anti-smoking group to get

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Hoff - Cross

1 other backing for its anti-tobacco campaign"?
2 "In view" -- then it goes on, "The American
3 Public Health Association resolution does not claim that a
4 causative relationship exists between smoking and lung
5 cancer, and does not mention the many other factors being
6 investigated. In view of these facts, this resolution can
7 be viewed only as another step by the anti-smoking group
8 that since 1954 has been trying to get other organizations
9 to support its extreme stand against tobacco."
10 Do you recall that?
11 A. Where was it published?
12 Q. It was a press release from the Tobacco Institute of
13 October 22nd, 1959, immediate release, and it was released
14 from their offices in New York City?
15 A. My question is where was it published?
16 Q. I don't know that.

17 A. I don't either. In other words, the newspapers I
18 would have been looking at could or could not have carried
19 that, but you don't know from a press release whether or
20 not it ever appeared, especially in the Ohio newspapers.
21 Q. So you are indicating to me, first off, you never saw
22 it and, secondly, you are challenging whether it ever
23 appeared?
24 A. I never saw that particular press release.
25 I saw statements, as I've indicated, in the

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Hoff - Cross

1 bottom of most of these major articles on these scientific
2 studies by representatives of the tobacco industry, some of
3 which sound a little like that.

4 But this one is very specific on a
5 resolution, and the chances of that being major news, even
6 in these stories we have gone over, is not too probable.

7 Q. Do you recall this press release or seeing this in
8 any newspaper article, from the Tobacco Institute:

9 "Washington: The Tobacco Institute today
10 issued the following comment on the opinions expressed by
11 Drs. Wynder and Day in their article published in the
12 Journal of the American Medical Association: 'Careful
13 readers will see that the authors offer no new findings or
14 no new scientific results to support their opinions set
15 forth in this article. These same views have been
16 expressed by Dr. Wynder repeatedly over the past few years
17 and are a subject of much disagreement in the scientific
18 world. The repetition by Dr. Wynder of his firm opinions
19 does not alter the fact that the cause or causes of lung
20 cancer continue to be unknown, and are the subject of
21 continuing extensive scientific research by many
22 agencies.'"

23 A. What was the date of that release?

24 Q. March 17th, 1961.

25 A. All right. I just, again, to put it in context --

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Hoff - Cross

1 Q. I guess first off I want to ask you -- and then I'll
2 let you say whatever you want.

3 A. Okay.

4 Q. If -- do you recall seeing it?

5 A. As that, the complete press release?

6 Q. Or a portion of it, even.

7 A. I'm -- I have seen similar statements in these
8 stories we have been talking about.

9 I don't recall seeing -- ever seeing a
10 complete press release. Those would have gone to the
11 newspapers and then been culled for publication.

12 Q. Do you recall seeing parts of that, as best you
13 recollect?

14 A. Similar wording, but I couldn't say it was from that
15 press release.

16 MR. McLAUGHLIN: Can the witness now finish
17 her answer, Your Honor?

18 Q. Say anything you want. I'm sorry.

19 A. Again, I think you have to remember that I'm
20 reporting to you as an expert witness on what was published
21 in newspapers and magazines that the average person might
22 have read.

23 The average person would have never seen a
24 press release from the Tobacco Institute as a press
25 release, because they were never carried in toto or

Hoff - Cross

- 1 completely in any of these popular media publications.
2 And language, sometimes similar language
3 could be found at the bottom, buried at the bottom of some
4 of these longer newspaper articles, but certainly no
5 newspaper I know of carried a complete press release as
6 you've read them to me here today, issued by the tobacco
7 industry.
8 Q. So what you are indicating to me is they might report
9 part of it and they might cut part of it?
10 A. Exactly.
11 Q. And what -- I guess what is a press release?
12 A. A press release is something that any organization
13 can hand out to newspapers, to magazine editorial boards,
14 to television stations, but the question that you have to
15 ask yourself as a social historian is were they published
16 or were they aired.
17 Q. Would you go one step at a time with me?
18 I want to let you say anything about this
19 one, too, but just for clarity, a press release is
20 something that was issued by an organization, is that
21 correct?
22 A. Yes.
23 Q. That's true, right?
24 A. Right.
25 Q. And the purpose for issuing press releases is why?

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Hoff - Cross

- 1 A. To get publicity, but it's no guarantee.
2 Q. No. No.
3 That's the purpose, right? I'm going to let
4 you say whatever you want. Please just bear with me.
5 A. All right.
6 Q. And when they come out of Washington, D.C., a lot of
7 those organizations issue those press releases nation-wide?
8 A. Yes.
9 Q. And how do they get them out nation-wide?
10 What's the mechanics of it?
11 A. It used to be by teletype, and now it's by electronic
12 means.
13 Q. So it's not all that difficult to have them go
14 nation-wide when they are issued, is that true?
15 A. That's true.
16 Q. Now, you can say anything you want, please. Thank
17 you for your patience.
18 A. I don't have anything else to say except a press
19 release is a press release is a press release. There is no
20 guarantee it will be used.
21 I had several national organizations issued
22 press releases which never saw the light of day. So having
23 a press release doesn't mean -- it isn't any indication of
24 how widespread it was actually used across the country.
25 Q. Thank you.

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Hoff - Cross

- 1 I'd like to ask you this question: In the
2 year 1958, did you come across any newspaper articles to
3 support this or did you come across the press release from
4 the Tobacco Institute, it's captioned "Richard says article
5 not in accord with fact. Washington. James P. Richards,
6 president of the Tobacco Institute Inc., today charged that
7 the July "Reader's Digest" article entitled 'The Cigarette

8 Industry Changes its Mind' is not in accord with fact. In
9 a letter to DeWitt Wallace, editor of the "Reader's
10 Digest," Mr. Richards said the cigarette industry has not
11 changed its mind. Our position was and is based on the
12 fact that scientific evidence does not support the theory
13 that there is anything in cigarette smoke known to cause
14 human lung cancer."

15 A. Where was that published?

16 Q. Ma'am, I don't know. I mean, I --

17 A. This is another press release then?

18 Q. Yes, ma'am. That's exactly, that's all it is. Might
19 have wound up in the "Barberton Herald," for all I know,
20 but I -- but it's the press release.

21 Do you recall anything about the press
22 release or seeing that article in any newspaper?

23 A. As I said, I haven't seen press releases coming from
24 the industry per se as you are reading here, and I'm
25 assuming that I would have seen, had "Reader's Digest"

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Hoff - Cross

1 published it, or "Reader's Digest" perhaps made it a letter
2 to the editor, but not to my knowledge, I don't think they
3 did.

4 Q. And do you recall any -- seeing anything in that time
5 period -- and when I say that, it was exactly on June 25th,
6 1958 --

7 A. Yes.

8 Q. -- and it says in a.m.'s of Wednesday.

9 In press release language, what does that
10 mean when they say "in a.m.'s of Wednesday, June 25th,
11 1958"?

12 A. I would assume it's referring to the morning.

13 Q. Trying to get it there so they can have it in their
14 morning paper if they want to use it, is that true?

15 A. Um-hmm. Yes.

16 Q. I believe you indicated in your deposition that you
17 were aware of the fact that tobacco companies in 1964 made
18 a large grant to the American Medical Association, is that
19 true?

20 A. I think we talked about that, yes.

21 Q. And I think you indicated you were aware of it?

22 A. Yes.

23 MR. COFER: Objection, Your Honor. Relevance
24 and beyond the scope.

25 THE COURT: Well, I don't permit questioning

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Hoff - Cross

1 about depositions unless it's for the purpose of refreshing
2 recollection or impeaching the witness, but just to start
3 off talking about what she said previously in a deposition
4 is improper examination.

5 The objection is sustained.

6 Q. Dr. Hoff, are you familiar with the fact that the
7 American Medical Association made a large grant -- or
8 received a large grant, forgive me, from tobacco companies
9 in 1964?

10 MR. COFER: Objection. Relevance.

11 THE COURT: Sustained.

12 Q. Okay.

13 MR. SMITH: That's all I have, Your Honor.
14 Thank you.

15 THE WITNESS: Thank you.

16 MR. COFER: I have a few questions, Your

17 Honor.
18 THE COURT: Proceed.
19 REDIRECT EXAMINATION OF JOAN HOFF
20 BY MR. COFER:
21 Q. Professor Hoff, you were asked about certain press
22 releases that the Tobacco Institute had, and I believe you
23 told Mr. Smith and the jury you weren't sure whether the
24 press releases themselves were ever published.
25 Is that fair?

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Hoff - Redirect

1 A. That's correct.
2 Q. And Mr. Smith asked you about -- he did ask you about
3 a publication called "A Frank Statement to Cigarette
4 Smokers," is that correct?
5 A. Yes.
6 MR. COFER: Mr. Smith, do you know the
7 Exhibit Number on that?
8 MR. SMITH: I can find it.
9 MR. COFER: No.
10 MR. SMITH: I'll look.
11 THE WITNESS: I think I have it.
12 Q. Okay.
13 MR. SMITH: That's one of them. There's
14 really two.
15 Q. What is it?
16 A. I have Plaintiff's Exhibit 2072.
17 MR. SMITH: And there is another exhibit for
18 the one she was supplied. There's two numbers.
19 MR. COFER: Okay. We've got this. Thanks.
20 Q. The fact is "A Frank Statement to Cigarette Smokers"
21 was published, correct, ma'am?
22 A. Yes.
23 Q. Could you tell the jury where it was published?
24 A. I think I mentioned earlier it was published across
25 the country in over 400, I think it was 443 or '48,

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Hoff - Redirect

1 newspapers on one day in January, 1954.
2 Q. January 4th, 1954?
3 A. January 4th, 1954.
4 Q. Full-page ads?
5 A. Full-page ads.
6 Q. And the sponsors included three of the defendants in
7 this lawsuit, is that right?
8 A. Yes, that's true.
9 Q. Philip Morris, Lorillard and American?
10 A. Um-hmm.
11 Q. Do you have that in front of you?
12 A. I do now, and I can read it. I mean, I can see the
13 names now.
14 Q. Would you read to the jury the first paragraph of "A
15 Frank Statement to Cigarette Smokers," please?
16 A. Yes. It reads "Recent reports on experiments with
17 mice have given wide publicity to a theory that cigarette
18 smoking is in some way linked with lung cancer in human
19 beings."
20 Q. Now, who brought that to the public's attention in
21 this ad?
22 A. This is the Tobacco Industry Research Committee.
23 Q. But the sponsors were Philip Morris --
24 A. The sponsors were the various tobacco companies. I
25 think it was said earlier there were maybe 14 of them.

Hoff - Redirect

- 1 Q. But it includes the American Tobacco Company, Philip
2 Morris and Lorillard, defendants in this case, is that
3 correct?
4 A. That's correct.
5 Q. Would you read to the jury the second and third
6 paragraphs of the Frank statement?
7 A. All right. Second one begins "Although conducted by
8 doctors of professional standing, these experiments are not
9 regarded as conclusive in the field of cancer research.
10 However, we do not believe that any serious medical
11 research, even though its results are inconclusive, should
12 be disregarded or lightly dismissed."
13 Q. Thank you.
14 And I showed you the science time line on
15 direct examination that talked about the various studies in
16 the fifties?
17 A. Um-hmm.
18 Q. Is it fair to say that as the 1950s progressed, that
19 we, as a society, learned more about the link between
20 cigarette smoking and lung cancer?
21 A. Yes, it -- it's fair to conclude that.
22 Q. During the fifties, at various points in the fifties,
23 were there people who believed that the -- or said that the
24 existing evidence was sufficient to conclude that
25 cigarettes, in fact, were a cause of lung cancer?

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Hoff - Redirect

- 1 A. Yes.
2 Q. Were there scientists at various points in the 1950s
3 who said, in fact, it was their view that the evidence was
4 sufficient to prove that cigarette smoking causes lung
5 cancer?
6 A. Yes.
7 Q. Were there people at various points in the 1950s who
8 said they did not believe that the evidence was sufficient
9 to prove that cigarette smoking causes lung cancer?
10 A. Yes.
11 Q. And were any of those people independent, outside
12 scientists not employed by the tobacco companies?
13 A. That's true.
14 Q. There was a couple questions about the opinion that I
15 asked you to give, and whether I asked you to use the
16 language that's appropriate for this case.
17 So I'm going to ask you those opinions again,
18 and I'm going to use the language from the Ohio statutes,
19 okay?
20 A. All right.
21 MR. SMITH: Object.
22 THE COURT: Well, you saw fit to repeat her
23 and put it on the board, what her statement was, and I
24 gather now, given that cross-examination, the counsel for
25 the defendants wants to clarify her testimony.

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Hoff - Redirect

- 1 I'll permit that to go on.
2 MR. COFER: Thank you, Your Honor.
3 Q. Dr. Hoff, as a professional historian with over 30
4 years of experience in researching historical issues, have
5 you formed an opinion, to a reasonable degree of
6 professional certainty, as to whether the link between
7 cigarette smoking and lung cancer was recognized by the

8 ordinary person with the ordinary knowledge common to the
9 community between 1950 and 1965?
10 A. Yes, I have.
11 Q. And what is that opinion, Doctor?
12 A. That the ordinary person or average citizen had been
13 made aware through the mass media of this link because of
14 the popularization of these scientific studies that began
15 in 1950 and continued throughout the decade of the fifties.
16 Q. Would your answer be different if you were
17 considering --
18 MR. COFER: Excuse me, Mr. Smith.
19 MR. SMITH: I apologize. I didn't mean to,
20 I'm sorry.
21 MR. COFER: That's all right. I wanted to
22 make sure she wasn't distracted.
23 MR. SMITH: I'm sorry. I know it was
24 distracting.
25

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Hoff - Redirect

1 BY MR. COFER:
2 Q. Professor, would your opinion change if the ordinary
3 person was defined as someone living in Ohio or someone
4 living in the United States in general?
5 A. Not really.
6 MR. COFER: Thank you very much. That's all
7 I have.
8 THE COURT: Any recross?
9 MR. SMITH: Briefly, Your Honor.
10 RECROSS-EXAMINATION OF JOAN HOFF
11 BY MR. SMITH:
12 Q. I was trying to -- I made noise, too, but aware of
13 the -- what was the verbiage?
14 A. What did I just say?
15 MR. COFER: Here is the statute, if you would
16 like.
17 MR. SMITH: No, just the verbiage she used.
18 THE COURT: He's not interested in the
19 statute. He's interested in what she said.
20 MR. COFER: I'm sorry.
21 MR. SMITH: It will be in the record. I
22 won't --
23 Q. Under the definition that you used earlier, I want to
24 ask you whether, when the Frank statement was issued --
25 which is 8800 and there's another number for the same

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Hoff - Recross

1 exhibit -- does that indicate to you that the tobacco
2 companies had the knowledge, the Frank statement?
3 A. They had the same knowledge that these scientific
4 reports had, which were being condensed and popularized for
5 the average person.
6 Q. And I have one last question, Doctor.
7 Dr. Hoff, I'd like you to please -- you were
8 rereading, there were some areas from the Frank statement.
9 A. Um-hmm.
10 Q. If you would go Column 1, please, I would just like
11 to ask you to read the last two short sentences, please.
12 On the left-hand column?
13 A. Of Column 1, fine.
14 Q. Yes, ma'am.
15 A. These are the -- there are two sentences each in a
16 paragraph by itself.

17 "We believe the products we make are not
18 injurious to health," and then the last sentence in that
19 column, "We always have -- have and always will cooperate
20 closely with those whose task it is to safeguard the public
21 health."
22 MR. SMITH: Thank you.
23 MR. COFER: I have nothing further, Professor
24 Hoff. Thank you very much.
25 (Witness excused).

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Hoff - Recross

1 MR. COFER: Your Honor, I request interim
2 argument at this time.
3 THE COURT: Members of the jury, in lengthy
4 cases such as this, I give the lawyers the opportunity to
5 engage in what's called interim argument. I limit it in
6 terms of the amount of time, but I have found by way of
7 experience that where I allow interim argument, it assists
8 the jury in evaluating what's going on in the case.
9 And I -- I recognize that I have a far better
10 grasp of what's going to come in than you do because of all
11 the work I have had to do pretrial in getting this case
12 ready for trial. So I'm reasonably conversant with most of
13 everything that's going to happen in the trial. You are
14 not.
15 And I find that interim argument does help
16 the jury.
17 Now, interim argument means that the lawyers
18 are now going to argue their respective positions. And you
19 are to accept it as argument; not like an opening
20 statement.
21 Interim argument is designed to persuade you
22 to a point of view, and the defense has requested interim
23 argument. And after the defense concludes his interim
24 argument, which cannot exceed five minutes, then if the
25 plaintiff wishes to use some of her time for interim

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1 argument, the plaintiff may do so or the plaintiff may
2 decide to defer.
3 But in any event, we will begin the process
4 now.
5 Mr. Cofer.
6 MR. COFER: Thank you, Your Honor.
7 Good afternoon, members of the jury.
8 Yesterday, Dr. Blum told you that using
9 hindsight, the case was closed in 1939.
10 That's like saying after the pass is
11 intercepted, the quarterback should have known he shouldn't
12 have tried to complete that pass to that receiver at that
13 time. It is a classic Monday morning quarterbacking.
14 Dr. Hoff told you it is the opposite of the
15 historical method, and it is absolutely contrary to
16 historical analysis, which tries to put us back in the past
17 in the context of the times, so we can judge the decisions
18 that people made based on where they were, and the
19 information they had.
20 Dr. Smith yesterday told you that in order
21 for there to be common knowledge, people had to have made
22 up their minds about what they were hearing and reading and
23 seeing.
24 Dr. Hoff told you that in her opinion, there
25 is a difference between common knowledge and belief.

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1 The fact is, you can't make people believe
2 anything. And I'll give you an example. A good argument
3 to be made right now over the last several years, the New
4 York Yankees are the best team in baseball. I promise you
5 there are many Cleveland Indian fans, Atlanta Brave fans
6 and New York Mets fans who would never believe that,
7 regardless what facts you told them.

8 The thing about our country is people are
9 free to believe what they choose to believe, and no one can
10 make them believe otherwise.

11 Belief is subjective. Knowledge is
12 objective.

13 We can determine what common knowledge is by
14 examining what people were reading, hearing and seeing, and
15 by what they were saying when they were asked questions in
16 Gallup polls.

17 Thank you very much for your attention.

18 THE COURT: You may proceed.

19 MR. SMITH: Thank you, Your Honor.

20 Ladies and gentlemen of the jury, very
21 briefly, we have a total of 45 minutes for interim
22 arguments, and I don't think I am going to require very
23 much time for this one.

24 First of all, the -- if you recall the
25 distinction between having heard -- the report of someone
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1 seeing a UFO is entirely different between believing that
2 there are UFOs.

3 And no matter what the testimony in this
4 case, no matter how intricate it may be attempted to be
5 made, it's very simple if you'll keep grounded in a few
6 concepts. Just having heard of something doesn't meet the
7 test for common knowledge.

8 The test for common knowledge is knowing that
9 it's there, recognizing the specific link between smoking
10 and lung cancer. When people don't believe that or don't
11 have an opinion on it, they haven't arrived at that level.
12 And that's one of the reasons we brought in -- you will
13 judge his qualifications but I will submit to you he was a
14 very well-qualified individual, Dr. Smith.

15 Dr. Blum's testimony dealt with warnings. He
16 testified if you looked back, the case is closed. He also
17 testified, looking forward from '39, that a reasonable
18 manufacturer should have been aware of the risk.

19 What the defendants want you to do is to say
20 that David Tompkin would have common knowledge if he heard
21 of the risk; they would have no common knowledge unless
22 they knew beyond a reasonable doubt; and they would have no
23 duty to warn unless they knew beyond a reasonable doubt.

24 And that's -- they want to put a hundred
25 percent standard for their conduct and knowledge, and a
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1 very low standard, a 5% standard or a 20% standard, on what
2 would be required of David Tompkin. And I'm going to
3 submit to you that that is contra to everything we know.

4 Are we supposed to judge the safety of what
5 we buy? Are we supposed to have the knowledge of it, or is
6 the knowledge, the people with the greater knowledge, the
7 ones making it?

8 And I submit to you that's just common sense,
9 and you all have it.

10 Thank you.

11 THE COURT: Thank you.

12 Please call your next witness.
13 MR. SMITH: Dr. Wilson, Your Honor.
14 THE COURT: Do you want to see if he's here,
15 please?
16 MR. SMITH: Yes, sir. And if not, we will
17 play the video, with the Court's permission.
18 (Pause)
19 DANIEL WILSON,
20 of lawful age, a witness called by the Plaintiff,
21 being first duly sworn, was examined
22 and testified as follows:
23 DIRECT EXAMINATION OF DANIEL WILSON
24 BY MR. SMITH:
25 Q. Will you state your name, please, sir?

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Wilson - Direct

1 A. Daniel Kevin Wilson.
2 Q. And your address, please?
3 A. [DELETED]
4
5 Q. And your occupation, sir?
6 A. Physician.
7 Q. And, Dr. Wilson, would you tell us, please, when you
8 graduated from medical school?
9 A. 1984.
10 Q. And you did your internship and residency where,
11 please?
12 A. At Cuyahoga Falls General Hospital in Cuyahoga Falls,
13 Ohio.
14 Q. And I should also ask you, you graduated from medical
15 school where?
16 A. The West Virginia school of osteopathic medicine in
17 Lewisburg, West Virginia.
18 Q. And you practiced in Cuyahoga Falls from when to
19 approximately when?
20 A. From June of 1990 to September of 1992.
21 Q. And you practiced in your field at that time was
22 what?
23 A. I was certified and board certified in family
24 medicine, and I was employed by GCO Family Medical Group
25 based in North Main Street in Akron, Ohio, at an office

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Wilson - Direct

1 that they had on Graham Road in Cuyahoga Falls.
2 Q. When you left there, you went where to work?
3 A. When I left here, I closed that practice, I went to
4 Pennsylvania to practice emergency medicine full-time in
5 Clarion, Pennsylvania.
6 Q. Did you grow up in Pennsylvania?
7 A. I'm sorry?
8 Q. Did you grow up in Pennsylvania?
9 A. Yes, I did. Yeah.
10 Q. And do you have a new board certification?
11 A. Yes, sir, I do.
12 Q. And it is in what field?
13 A. That's in the emergency medicine.
14 Q. And I understand you love doing emergency medicine?
15 A. Yes, that's my first love, yeah, uh-huh.
16 Q. Approximately when -- or you can look at your
17 records, but when or approximately when did you first meet
18 David Tompkin?
19 A. I met him first on the 22nd of June in 1990.
20 Q. And what role -- would you have the role of his

21 family physician at that time?
22 A. Yes.
23 Q. And I want to -- I'm going to try to shortcut this as
24 best I can because of the time limitations that we have.
25 During -- you were his physician from when to
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Wilson - Direct

1 when?
2 A. From June of 1990 until I left the practice in
3 September of 1992.
4 Q. And it's my understanding that the primary care was
5 regarding he had trouble with his low back from time to
6 time?
7 A. That's correct.
8 Q. During that period of time, did he have any
9 difficulty with his lungs of which you were aware?
10 A. The first time he had mentioned any lung or chest
11 difficulties was in -- excuse me a moment, I'm sorry.
12 Q. That's okay. You take your time.
13 A. This was in March, March 27th, 1992.
14 Q. And was that some discussion of pain in his right
15 breast area?
16 A. That is correct.
17 Q. Did you then or subsequently refer him to an
18 oncologist for evaluation?
19 A. Yes, sir. If it pleases the Court, I -- I treated
20 him initially for some pain in his chest, and he did not
21 improve.
22 Then I sent him to a surgeon for evaluation
23 because he had an enlargement in his right breast area.
24 And then from there, he was referred to an oncologist after
25 we did some subsequent tests.

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Wilson - Direct

1 Q. Okay. And I think he went to the tumor board in
2 Cuyahoga Falls and they were not able to determine the
3 primary site, and sent him to Dr. Haas who made the
4 diagnosis, is that your understanding from your records?
5 A. That's correct. Um-hmm.
6 Q. Is that correct, sir?
7 A. That is correct.
8 Q. Okay.
9 MR. SMITH: That's all I have, sir. Thank
10 you very much for coming.
11 Q. I guess your child is still being treated at Hudson,
12 and you were here today and kind enough to appear, is that
13 correct?
14 A. Yeah. Thank you. Yes.
15 MR. McLAUGHLIN: We have no questions, Your
16 Honor. Thank you, Doctor.
17 THE WITNESS: Thank you.
18 THE COURT: You may step down. Thank you.
19 THE WITNESS: Thank you, Your Honor.
20 (Witness excused).
21 MR. SMITH: With the Court's permission, we
22 will play the video.
23 THE COURT: All right. We will take a brief
24 recess, but I want to make sure everything is set on the
25 video before we start.

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Wilson - Direct

1 You may file out. I'll call for you as soon
2 as we are ready.

3 (Jury out).
4 THE COURT: Now, I understood there were
5 still unresolved issues with the video?
6 MR. SUFFERN: Yes, Your Honor. I think we
7 have two that I'm aware of.
8 THE COURT: Can somebody give me a copy of
9 the testimony so I can follow it?
10 MR. SUFFERN: Your Honor, I would refer you
11 to Page 59, Line 14 through Page 60, Line 18.
12 And the other --
13 THE COURT: Let me get that one, first.
14 MR. SUFFERN: Okay. The issue --
15 (Side-bar conference had off the record).
16 THE COURT: Now, as I understand the
17 objection of the defendant is Line -- Page 59, Line 14
18 through Page 60, Line 18 when I gather the -- even though
19 it's not apparent from the transcript, it will be apparent
20 from the video that undescribed ads were being shown to the
21 plaintiff.
22 When I say "Undescribed," they are not
23 described in the transcript, but one can -- but apparently
24 they were held up to the camera in such a fashion that you
25 can see whose ad it was.

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1 MR. SMITH: Yes, sir. Yes, Your Honor.
2 THE COURT: All right. Now, you are
3 objecting to that, when he says he's seen the ad before,
4 you are objecting to that for what reason?
5 MR. SUFFERN: Your Honor, the only purpose
6 for the testimony would be to create an inference that the
7 ads somehow played a role in Mr. Tompkin's decision to
8 smoke the Pall Mall brand.
9 Mr. Tompkin also testified --
10 THE COURT: Was he asked about that on
11 cross-examination?
12 MR. SUFFERN: He was, Your Honor. He was
13 asked on cross-examination whether the fact that his wife
14 smoked Pall Malls played a role in his decision.
15 THE COURT: No. No. Was he asked about the
16 ad that he identified, as to whether that played a role in
17 his decision to smoke?
18 MR. SUFFERN: Your Honor, I can't cite a page
19 reference, but I am certain that Mr. Riley, on behalf of
20 the American Tobacco Company, took him through numerous ads
21 and asked him whether he was claiming any reliance upon
22 those ads.
23 I can't cite a page reference to Your Honor.
24 Mr. Riley's cross-examination starts on Page 91.
25 THE COURT: You haven't looked at it to find

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1 something?
2 MR. SUFFERN: Your Honor, I have looked at
3 it, and I can't represent to you -- well, perhaps if we
4 turn to the portion that was excluded regarding -- already
5 by Your Honor, regarding the fact that he relied in part
6 upon Mrs. Tompkin's -- the fact that she smoked Pall Mall,
7 which I believe appears at Page 94 --
8 THE COURT: You had all night to prepare
9 this, and you can't cite me pages that correspond to your
10 objection?
11 MR. SUFFERN: I apologize, Your Honor. I was
12 citing the pages -- I only concentrated on citing the pages
13 that I was seeking to have excluded because I thought --

14 THE COURT: Well, the motion is denied. We
15 will play them.

16 You are going to have to be absolutely
17 prepared on these things. I'm not going to spend all this
18 time when you have had almost an entire day to explain to
19 me what your objections were.

20 They are denied.

21 Bring the jury -- I'll go get the jury. Are
22 you ready to go?

23 MR. SUFFERN: Your Honor, yesterday we asked
24 if we could make a proffer on the issue of Mrs. Tompkin's
25 smoking history.

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1 Could we be permitted to make the record
2 before the jury comes back?

3 THE COURT: It's in the deposition. You can
4 read it, can't you?

5 MR. SUFFERN: No, Your Honor. You excluded
6 those portions of the deposition.

7 THE COURT: I understand, but you can
8 certainly point out to the Court of Appeals where it is in
9 the transcript.

10 MR. SUFFERN: But the basis for our objection
11 was not that it would introduce ETS as a causation issue
12 into the case.

13 The basis for our objection was that it gives
14 an incomplete picture of Mr. Tompkin's purported reliance
15 on ads when, in fact, he testified during the deposition
16 that he relied in part upon the fact that Mrs. Tompkin
17 smoked Pall Malls, in forming his decision to smoke Pall
18 Malls.

19 THE COURT: I thought there was an agreement
20 before the trial that we would not discuss Mrs. Tompkin's
21 smoking history. That's what I was left with very clearly.
22 You keep changing the game.

23 MR. SUFFERN: We never agreed to that, Your
Honor.

24 THE COURT: My impression is to the contrary.
Your motion is denied. I want to get on with
this trial.

25 MR. SUFFERN: Thank you, Your Honor.
(Jury in.)

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DIRECT - TOMPKIN

1 THE COURT: Okay. Let's roll them.

2 (The video deposition of David Tompkin was
3 played in open court, as follows:)

4 DIRECT EXAMINATION

5 BY MR. SMITH:

6 Q Do you smoke cigarettes David?

7 A No, not now, sir.

8 Q Do you smoke anything?

9 A No, sir.

10 Q Did you smoke tobacco?

11 A Yes, I did.

12 Q Would you tell us the approximate years when you would
13 have regularly smoked tobacco?

14 A 1950 through 1965.

15 Q And that would have meant you were how old when you
16 began smoking regularly?

17 A 1950 I would have been 16 year old.

18 Q And then you quit in 1965?

19 A Yes, sir.

20 Q During the years you smoked, did you believe that
21 smoking would cause you a serious health problem?
22 A No, sir, not really, no.
23 Q And why do you say that?
24 A It's -- I don't know, I just don't feel that -- I
25 don't know.

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DIRECT - TOMPKIN

1 Q I want to know whether or not during the years you
2 smoked, did you believe it would cause you or could cause
3 you a serious health problem?
4 A No, sir.
5 Q Did you inhale when you smoked?
6 A Yes, sir.
7 Q Would you tell us the brands that you smoked regularly
8 during the years that you smoked?
9 A It would have been Old Golds, Philip Morris, Pall
10 Malls, Chesterfield, Herbert Tareyton, Kents and Lark.
11 Q The first cigarette that you smoked would have been
12 what, when I say smoked I mean smoked regularly?
13 A It would have been Old Gold.
14 Q And what, in what years approximately did you smoke
15 Old Gold's?
16 A 1950 through '51.
17 Q Did anyone else in your family smoke Old Golds?
18 A Yes, sir.
19 Q Who was that?
20 A My older brother.
21 Q And his name?
22 A Gilbert.
23 Q And when you say your older brother, how much older
24 than you is he?
25 A He's five years.

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DIRECT - TOMPKIN

1 Q So you indicated you started when you were 16 and he
2 would have been 21 at that time?
3 A Yes, sir.
4 Q Approximately how many cigarettes a day were you
5 averaging during this period of 1950 and into 1951 when you
6 smoked the Old Golds?
7 A Approximately 4 to 6.
8 Q Did you change to another cigarette regularly as a
9 regular smoker at that time when you quit Old Golds?
10 A Yes, I did.
11 Q And what cigarette was that?
12 A Philip Morris.
13 Q And during what years, approximate years did you smoke
14 Philip Morris, Dave?
15 A 1951 through approximately '54.
16 Q And how many cigarettes were you smoking a day on an
17 average during that period, your best estimate?
18 A Approximately 4 to 6.
19 Q And when we get into 1954, you are smoking Philip
20 Morris, did you switch to another brand?
21 A Yes, sir.
22 Q And what brand was that, please?
23 A It was Pall Malls.
24 Q And approximately how long or approximately what years
25 did you smoke Pall Malls?

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DIRECT - TOMPKIN

1 A '54 through '57.

2 Q And approximately how many cigarettes were you
3 averaging per day during that period?
4 A Six to eight.
5 Q Now in 1957, Dave, did you switch to another
6 cigarette?
7 A 1957? Yes.
8 Q And what was that?
9 A '57 it would have been Chesterfields.
10 Q And would you tell us the years approximately that you
11 smoked Chesterfield, please?
12 A Until approximately 1959.
13 Q And during the period then from 1957 through or into
14 1959 when you smoked Chesterfields, would you tell us
15 approximately how many cigarettes per day you were
16 averaging?
17 A Probably ten, somewhere in there.
18 Q In 1959 did you change to another cigarette?
19 A Yes, 1959 I was Chesterfields.
20 Q Yes, you were smoking Chesterfields. Did you change
21 to another cigarette at that time?
22 A 1959. Yes, I did.
23 Q And what cigarette was that?
24 A That was her Herbert Tareyton.
25 Q And would you tell us the approximate years that you

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DIRECT - TOMPKIN

1 smoked Herbert Tareyton?
2 A About 1961.
3 Q That would be from when to when then?
4 A '59 to '61.
5 Q And approximately how many Herbert Tareytons, or how
6 many cigarettes were you smoking on an average during that
7 '59 to '61 period, as best you recollect?
8 A One and a half packs.
9 Q Can you tell us why you switched to Herbert Tareyton?
10 A Yes.
11 Q And why was that?
12 A Because of the filter.
13 Q What do you mean a filter?
14 A Well, the charcoal filter that I remember.
15 Q When you say charcoal filter, what cigarette had the
16 charcoal filter?
17 A It was Herbert Tareyton.
18 Q How did you learn of Herbert Tareyton having this
19 charcoal filter when you made the switch?
20 A Through advertising.
21 Q And that would have been advertising by whom or by
22 what cigarette company?
23 A Herbert Tareyton.
24 Q In 1961, when you quit smoking Herbert Tareyton
25 regularly, did you go to another cigarette?

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DIRECT - TOMPKIN

1 A Yes.
2 Q And what cigarette was that?
3 A Kent.
4 Q Would you tell us the approximate years that you
5 smoked Kent, Dave?
6 A '61 through '64.
7 Q And during this period of '61 to '64, can you tell us
8 approximately how many cigarettes a day you are smoking
9 then?
10 A '61 through '64? Probably two to three.

11 Q When you say two to three, you mean two to three what?
12 A Packs.
13 Q And that's an average per day?
14 A Well, if you have to average I would say maybe 2 to 2
15 and a half, some days you might hit 3.
16 Q You say your average would be 2 to 2 and a half but
17 your high days would be 3 packs?
18 A Yes, sir.
19 Q Would you tell us why it was in 1961 you switched from
20 Herbert Tareyton to Kent?
21 A It would be the filter, micronite filter.
22 Q On what cigarette?
23 A Kents.
24 Q And how did you learn that Kent cigarettes had a
25 micronite filter?

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DIRECT - TOMPKIN

1 A Through advertising.
2 Q And this would have been advertising of what cigarette
3 company?
4 A It was Kents.
5 Q In 1964 was the end of the period that you smoked Kent
6 regularly, as best you remember?
7 A Yes.
8 Q What cigarette did you go to then, Dave?
9 A Larks.
10 Q What period of time did you smoke Larks?
11 A '61 through '65.
12 Q During that period of time, would you tell us how many
13 cigarettes a day you are smoking, the range?
14 A It would be probably about the same as I did with the
15 Kents.
16 Q And for the record, if you would state that?
17 A Okay. It would be 2 to 2 and a half to 3 max.
18 Q Average 2, 2 and a half, max 3?
19 A That's correct.
20 Q Same as Kent?
21 A Right.
22 Q Why was it that you switched to Lark?
23 A That would have been the filter also.
24 Q What do you mean the filter? What about their filter?
25 A It had a charcoal filter, and I believe it had said it

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DIRECT - TOMPKIN

1 had outer filters and inner filters. That was the phrase,
2 if I recall.
3 Q And that's why you switched to that?
4 A Yes, sir.
5 Q Where did you learn about these filters?
6 A Through advertising.
7 Q And this would have been the advertising of what
8 cigarette company?
9 A It would have been Lark's.
10 Q And I guess for purposes of the record, make sure the
11 record is clear, what was there about these ads that you saw
12 that you have indicated caused you to be aware of filters
13 and you switched to their cigarettes, what was it about
14 these ads of these three companies, Herbert Tareyton, Kent
15 and Lark that caused you to think that you wanted to smoke
16 their cigarette with their filters, if anything?
17 A I would say safety.
18 Q Dave, when did you quit smoking again, please?
19 A 1965.

20 Q Tell us the circumstances of your quitting?
21 A Well, I knew it was affecting my breathing.
22 Q What do you mean by that?
23 A Well I would have to exert, exert extra on your body,
24 put more pressure on your body, do more physical activity.
25 I felt I just didn't have the lung capacity there.

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DIRECT - TOMPKIN

1 Q When did you start becoming aware of that,
2 approximately?
3 A Probably two to three years before.
4 Q Before you quit?
5 A Yes.
6 Q Tell us the circumstances of your quitting, where you
7 were, and what you did?
8 A Well, we were working on a building.
9 Q Where at?
10 A In Akron, Ohio. It's called Stan Hewitt.
11 Q What is Stan Hewitt?
12 A That's a home that was built by the Sieberling family.
13 And after, I imagine after each one of them died off, they
14 wanted to turn it over to the city or something, so it
15 wouldn't be tore down, so they wanted it preserved. So they
16 started an association to rehabilitate it and have tours
17 through there.
18 Q And this was a period, this was after that association
19 was started, as you understand it, when you were there
20 working?
21 A I'm sorry I interrupted you.
22 Q Yeah.
23 A I'm not sure about the association, whether it was in
24 force before I worked, afterwards, there was, I'm not
25 familiar with that.

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DIRECT - TOMPKIN

1 Q But your company went out there to do work on the
2 brick of that building?
3 A Yes, sir.
4 Q Had anyone else in your family ever worked on that
5 building?
6 A Yes.
7 Q And who would that have been?
8 A My grandfather.
9 Q The type of work that you were doing on that building
10 at the time you were there would have been what, David?
11 A It is called tuck pointing.
12 Q What does that mean?
13 A Cutting out the loose mortar and any cracks or holes
14 in the mortar and replacing it with mortar sealing them off.
15 Q And what was the weather like on the day that you
16 decided to quit?
17 A I remember it was cool, because I had a flannel shirt
18 on, I remember that.
19 Q Did you have a jacket on?
20 A Not that I recall.
21 Q But you had a flannel shirt?
22 A Yes, sir.
23 Q And by that, what season do you think you were in at
24 that time, as best you remember?
25 A It would have been either the spring or the fall.

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DIRECT - TOMPKIN

1 Q Tell us the circumstances of your quitting, whether

2 anything was said or just what happened?
3 A Well, I was with a friend of mine.
4 Q Who was that?
5 A Roll Walters, he works with us. Or worked with that
6 company.
7 Q You were both working together on the job?
8 A That's correct.
9 Q You were a bricklayer?
10 A Correct.
11 Q And his title on that job was what?
12 A Laborer.
13 Q All right. Go ahead, please.
14 A And we were standing there in the morning and I told
15 him that I decided I was going to quit, or I wasn't -- if I
16 quit I quit, if I didn't I didn't. And so he said that
17 sounded like a good idea and he decided he was going to quit
18 also.
19 Q What did you do then?
20 A I just quit.
21 Q And have you ever smoked again?
22 A No, sir.
23 Q Had you ever tried to quit before this day in 1965?
24 A Yes, I had.
25 Q On very many occasions?

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DIRECT - TOMPKIN

1 A Probably a couple times that I recall.
2 Q And would those efforts successful?
3 A No, sir.
4 Q But the one in '65 was?
5 A Yes, sir.
6 Q Dave, have you ever drank alcoholic beverages in your
7 life?
8 A Yes, sir.
9 Q Was there ever a period of time that, in your opinion,
10 you were drinking too much alcohol?
11 A Yes, sir.
12 Q What did you do about that?
13 A I quit.
14 Q And when was it that you quit, approximately?
15 A '89.
16 Q Also for the record, did you ever have anyone in your
17 family, to the best of your knowledge, who has died of lung
18 cancer?
19 A No, sir.
20 Q Have you had, as best to your knowledge, people who
21 have died of cancer?
22 A Yes.
23 Q But no lung cancers, to the best of your knowledge?
24 A That's right.
25 Q Dave, I would like to go back, go through your working

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DIRECT - TOMPKIN

1 history a little bit, please.
2 Now, you graduated from high school in what
3 year?
4 A 1952.
5 Q Did you work prior to graduating from high school?
6 A Yes.
7 Q And would you tell us about that?
8 A How far back?
9 Q Back to when you remember working as a kid?
10 A I used to mow lawns here when I was very young. I was

11 a paper boy. I worked in three, three gas stations.
12 Q What did you do in the gas stations?
13 A One I washed cars. Two of them I pumped gas in; and
14 one of them I pumped the gas and changed the oil.
15 Q Okay. And are you in high school in this period we
16 are talking about?
17 A Yes, sir.
18 Q Okay. Any other jobs that you can think of that you
19 had before you graduated from high school?
20 A Falls Theater.
21 Q What did you do there?
22 A I was an usher and I worked in a popcorn room. And I
23 worked in a parking lot.
24 Q For the theater?
25 A Yes, sir.

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DIRECT - TOMPKIN

1 Q Does that cover most of your jobs before you graduate
2 from high school?
3 A No, sir.
4 Q Okay.
5 A I worked at Old Trail School.
6 Q What did you do there?
7 A Mowed the grass, cleaned the rooms. And that's about
8 it.
9 Q Then you graduated in 1952?
10 A Right.
11 Q What did you then do, sir?
12 A I believe I was still working in the one gas station,
13 and I know I went to work at Stalwart Rubber, but I think
14 that was later on. Let's see that would have been -- yes, I
15 went to work at Stalwart Rubber after the gas station.
16 Q And where -- how long were you at Stalwart Rubber,
17 approximately?
18 A About nine months.
19 Q Then what did you do?
20 A I started my bricklayer apprenticeship.
21 Q Approximately what year are we in?
22 A 1953.
23 Q This would have been before you and Jocelyn were
24 married?
25 A Yes, sir.

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DIRECT - TOMPKIN

1 Q And how long did your apprenticeship last?
2 A Until 1957.
3 Q So it was a four year apprenticeship?
4 A Yes, sir.
5 Q What is a bricklayer apprenticeship?
6 A Well, it's just where you are indentured to a company
7 and it is their obligation to teach you the trade, and then
8 you have to go to school at night for four years.
9 Q Regarding bricklaying?
10 A Yes, sir.
11 Q Where did you go to school at?
12 A Howard Trade Vocational.
13 Q That's in what city?
14 A Akron, Ohio.
15 Q And in 1957, were you successful in completing your
16 apprenticeship?
17 A Yes, sir.
18 Q What happened then, as far as -- what was your job
19 title?

20 A Brick mason, bricklayer.
21 Q And what are the advantages of being a brick mason or
22 bricklayer over being an apprentice?
23 A Well, you can go anywhere you want to.
24 Q Does it pay better?
25 A Definitely.

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DIRECT - TOMPKIN

1 Q Okay. From 1957 forward, have you been in the
2 bricklaying field since that time?
3 A Yes, sir.
4 Q Tell us briefly of your employers coming forward, if
5 you would, please?
6 A My apprenticeship was with John Jacobson, Akron, Ohio,
7 Frank Brown and Son, Joe Livigni. And I went into business
8 for myself and Joe -- Joe Livigni.
9 Q You and Joe Livigni went into business together?
10 A Yes, sir.
11 Q This was what year, approximately?
12 A It would have been 10 years ago, it would have been
13 '84.
14 Q And have you gentlemen been in business ever since?
15 A Yes, sir.
16 Q And the name of your company?
17 A D and J Masonry, Incorporated.
18 Q And you folks own the stock in that company?
19 A Yes.
20 Q The records of your earnings that you've made as far
21 as your work is concerned are contained in a Social
22 Security printout that you obtained, is that correct?
23 A Yes.
24 Q I'm going to hand you what has been marked Plaintiff's
25 Exhibit Tompkin 35.

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DIRECT - TOMPKIN

1 Would you tell us what that is, please, sir?
2 A That's a where you send into the federal government,
3 the Social Security office, and I'll send you back a record
4 of your earnings.
5 Q Is that a record of your earnings?
6 A Yes, sir.
7 Q And that covers what years?
8 A Well, it starts at 37 through 50 down through '93.
9 Q Does it include '93 or is that a blank?
10 A It's just a -- or no this one here is '92 and '93, I
11 beg your pardon. I'm looking over in the wrong column.
12 Q The year that one is is what?
13 A '93, but it's partial.
14 Q Now, the first page of this exhibit is the cover
15 sheet, is that correct?
16 A Right.
17 Q And then the second page, which we'll mark as actually
18 Exhibit 35 dash 2. That is the sheet that shows your
19 specific earnings, is that correct?
20 A Right.
21 Q Dave, I would like you to look at that, please, and
22 the high or the highest amount you see on that is what, how
23 many dollars?
24 A Okay. My taxed earnings?
25 Q Yes.

815

DIRECT - TOMPKIN

1 A The highest amount would be \$32,416.

2 Q That would be in what year?
3 A 1990.
4 Q And the lowest amount on there would be what?
5 A 1951.
6 Q And that's how many dollars?
7 A \$290.
8 Q Better to lay brick than work in a gas station?
9 A Definitely.
10 Q Dave, in 1992, your earnings were how much, sir?
11 A 1992?
12 Q Yes?
13 A \$13,972.
14 Q Was that a year that you worked a full year or not?
15 A No, sir.
16 Q Was that the year that you were diagnosed as having
17 lung cancer?
18 A Yes, sir.
19 Q Did that seriously impact your earnings in that year?
20 A Yes, sir.
21 Q We'll come back to that.
22 I'm going to hand you what has been marked
23 Plaintiff's Exhibit Tompkin 36. Can you tell us what
24 that is, please?
25 A That's my tax return for 1993.

816

DIRECT - TOMPKIN

1 Q And that shows that you earned how much in 1993?
2 A \$25,661. My actual -- that is with interest and so
3 forth.
4 Q How much does it show that you earned from your
5 occupation?
6 A Wages is \$21,275.
7 Q And again, was that impacted, your earnings from your
8 occupation, was that impacted by your lung cancer?
9 A Yes, sir.
10 Q How long did you expect to continue to work, Dave, if
11 you had the ability to do so?
12 A The longest I expected to work?
13 Q Yes, sir?
14 A 65.
15 Q If you, and for that matter if your health permits you
16 to continue to do that, is it still your intention to work
17 to age 65?
18 A Yes.
19 Q Based upon your education and your experience in the
20 field of being a bricklayer since back, I guess, starting as
21 an apprentice 41 years ago, and your desire insofar as
22 working, continuing the work is concerned, how much did you
23 intend to earn per year and expect to earn per year in the
24 years from now up until age 65?
25 A 25 to 30,000.

817

DIRECT - TOMPKIN

1 Q Is that your opinion?
2 A That's my opinion.
3 Q And is that opinion as to what you think you would
4 have earned, is that the probable amount? Can you tell us
5 what that's based on? The probabilities of what you would
6 have earned?
7 A The probability for me to earn that money is there,
8 yes, with my talent and my physical, if I had good physical
9 ability, yes.
10 Q That is your opinion?

11 A That is my opinion, yes.
12 Q I'm going to hand you for identification Plaintiff's
13 Exhibits Tompkin 18, 19, 20, 21, 22, 23, 24, 25, and 26.
14 Would you look at those, please, Mr. Tompkin and
15 tell us what they are?
16 A They are ads for cigarettes, yes.
17 Q And take a quick look through each of those sheets. I
18 know you can see the top one?
19 A Yes, sir.
20 Q Do those ads fairly and substantially represent the
21 ads that you saw and you've referred to that you saw earlier
22 regarding Kent cigarettes?
23 A Yes.
24 Q Would you tell us first of all, what is Tompkin 25, to
25 make sure our foundation is clear? Is that 25 or 26, the

818

DIRECT - TOMPKIN

1 number you will see in the corner the yellow sticker?
2 A I see 18.
3 Q 18, forgive me.
4 A 19, 20.
5 Q Go to 18, Dave, that's okay?
6 A 18?
7 Q Yeah. And can you tell us what that ad is, in
8 essence?
9 A That's an ad advertising the filter, filter on their
10 cigarette.
11 Q What cigarette is that?
12 A Kent.
13 Q And what type of filter is that?
14 A It's a micronite filter.
15 Q Let's go back to -- that's Tompkin 18, is that
16 correct?
17 A Yes.
18 Q And can you tell us whether or not you have seen that
19 ad?
20 A Yes, I have seen that ad.
21 Q And can you tell us when you have seen that ad?
22 A It was either when I was smoking or during the time
23 frame. It was when I was smoking I saw it.
24 Q Would that have, that particular ad or an ad
25 substantially like it, would you have seen, with respect to

819

DIRECT - TOMPKIN

1 the micronite filter language, would you have seen that ad
2 before you began smoking Kents or after?
3 A Before.
4 Q You testified to that earlier, is that correct?
5 A Yes.
6 Q Would you hold that ad up for us, please?
7 (The witness did as instructed.)
8 Q I would like to go to the next exhibit. This is
9 Tompkin 19?
10 A Yes, sir.
11 Q Would you tell us what that is, please?
12 A Yes, that's another ad for Kent cigarettes advertising
13 the micronite filter.
14 Q And again, when would you have seen that ad with
15 respect to the portion advertising the micronite filter?
16 A During the period I was smoking.
17 Q With respect to your smoking Kent, would you have seen
18 that ad before or after you smoked Kent?
19 A It was before.

20 Q Go to the next exhibit, please.
21 What is that exhibit?
22 A This is 20.
23 Q And what is that?
24 A That's another ad for Kent cigarettes.
25 Q And does that also talk about the micronite filter?

820

DIRECT - TOMPKIN

1 A Yes, sir.
2 Q Can you tell us whether or not that ad, that picture
3 fairly and accurately represents advertisements that you saw
4 with respect to Kent before you began smoking Kents?
5 A Yes, sir.
6 Q And what is that ad, sir, does it or does it not?
7 A It was before.
8 Q And does it fairly and accurately represent what you
9 saw before?
10 A Yes.
11 Q The next exhibit.
12 What was that?
13 A 21.
14 Q Would you tell us what that is, please?
15 A That is another advertisement for Kent cigarettes.
16 Q Does, can you tell us when you saw that particular ad,
17 substantially similar ad?
18 A It was when I was smoking.
19 Q You have seen them?
20 A Yes, sir.
21 Q The lead language in that particular exhibit says
22 what? Bold language at the top?
23 A "Here is how science solved your problem of sensitive
24 to nicotine and tars with a great new cigarette, Kent."
25 Q And then it goes on in the body to talk about the

821

DIRECT - TOMPKIN

1 micronite filter moes it?
2 A Underneath Kent I presume it does in the fine print,
3 it's hard tore for me to read with this copy, but here in
4 the bolder print it is micronite filter exclusive.
5 Q What's the language regarding that?
6 A It says Kent with exclusive micronite filter.
7 Q And again, could you tell us when you saw that
8 particular ad with respect to the time period you were
9 smoking Kents?
10 A It was before I smoked Kents.
11 Q The next exhibit is Exhibit Number what?
12 A 22.
13 Q And what is that, please, sir?
14 A This is another ad for the filter of Kent cigarettes.
15 Q And by the filter of Kent cigarettes we are talking
16 about what filter?
17 A Micronite.
18 Q And can you tell us again whether or not you saw that
19 particular ad?
20 A Yes, I did.
21 Q And can you tell us again for the record when you saw
22 that particular ad with respect to your smoking of Kent
23 cigarettes?
24 A It was before.
25 Q The language up at the top of that ad says what?

822

DIRECT - TOMPKIN

1 A "Why do these stains mean so much to one out of every

2 three smokers?"
3 Q Okay. If you could face that back to us again.
4 Thank you, sir. Would you go to the next
5 exhibit, please?
6 A Exhibit 23.
7 Q And would you tell us what that is?
8 A That's ab ad for Kent cigarettes and the micronite
9 filter.
10 Q Can you tell us whether or not you saw that ad --
11 you've seen that add before?
12 A Yes, I had.
13 Q And when was that?
14 A That was before I started smoking Kents.
15 Q Would you read the top portion of that particular ad
16 to us?
17 A "The American Medical Association voluntarily
18 conducted in their own laboratory a series of independent
19 test of filters and filter cigarettes as reported in the
20 Journal of American Medical Association. These tests proved
21 of all the filtered cigarettes tested, one type was the most
22 effective for removing tars and nicotine. This type filter
23 is used by Kent and only Kent."
24 Q Would you put that back again to us for a moment,
25 please?

823

DIRECT - TOMPKIN

1 A Thank you.
2 Q Show us the next exhibit, please. Or if you would
3 look at the next one yourself. That's Exhibit Number what,
4 that you have in your hand?
5 A 24.
6 Q And can you tell us whether or not you've ever seen
7 that exhibit before?
8 A Yes, I have.
9 Q And when was that?
10 A That was before I was smoking Kents.
11 Q And would you show that to us, please.
12 Can you hold it so that we can have it on camera
13 while you are reading it at the same time, please? Maybe
14 your wife will help you hold it back there?
15 A I can read it this way.
16 Q So the camera can get it while you are reading, okay?
17 A Okay.
18 Q What does it say at the top?
19 A "The difference in price is just a few pennies, the
20 difference in protection is priceless."
21 Q Thank you. Thank you.
22 Would you look at the next ad, please? That's
23 Exhibit Number what that you are holding?
24 A 25.
25 Q Would you tell us whether or not you've ever seen that

824

DIRECT - TOMPKIN

1 ad before?
2 A Yes, I have.
3 Q And when was that, please?
4 A That was before I was smoking Kents.
5 Q And would you turn that to us a minute, please?
6 And what are the three key words on that ad in
7 the boldest print?
8 A "Kent filters best."
9 Q Can you tell us whether or not it references the
10 micronite filter?

11 A Yes, it says micronite filter.
12 Q Your next exhibit that you have over there is what?
13 A 26.
14 Q And would you tell us whether or not you've ever seen
15 that particular ad before?
16 A Yes.
17 Q And that would have been when?
18 A When I was smoking Kents.
19 Q And would you tell us, or would you show it to us,
20 please?
21 And if you can read us the key words, but do it
22 in a way that we can see it at the same time, please?
23 A "Treat your taste kindly with Kent."
24 Q Thank you.
25 I'm going to now hand you what has been marked

825

DIRECT - TOMPKIN

1 as Plaintiff's Exhibits 15, 16 and 17.
2 With respect to Plaintiff's Exhibit 15, would
3 you tell us what that is, please?
4 A That's an ad for Herbert Tareyton cigarettes.
5 Q Have you ever seen that ad before?
6 A Yes, I have.
7 Q And when was that?
8 A This was before I smoked Herbert Tareytons.
9 Q Would you show that ad to us for a minute?
10 The -- there is a distinctive -- is there a
11 distinctive feature about that ad that you recall?
12 A The little guy in the hat.
13 Q Was that their logo?
14 A I don't know if it's the logo, but he was present in
15 their advertising.
16 Q When you say present, was he present in all of it or
17 some of it?
18 A Just some of the ads that I recall.
19 Q Would you show us -- would you look at the next
20 exhibit rather, please?
21 And that is exhibit number what, Dave?
22 A 16.
23 Q And have you ever seen that ad before?
24 A Yes, sir.
25 Q And when was that?

826

DIRECT - TOMPKIN

1 A That was -- I believe this one was while I was smoking
2 Herbert Tareytons.
3 Q Okay.
4 A No, this was after.
5 Q That ad?
6 A Let's see -- this is while I was smoking Herbert
7 Tareytons.
8 Q Does it reference a filter?
9 A Yes, sir.
10 Q And what does it, what does it say about its filter?
11 A It says it's a dual filter.
12 Q And would you show that to us, please?
13 A Yes.
14 Q The -- what does it say at the top of that ad?
15 A "Dual filter gives you what no single filter can."
16 Q And then underneath there what does it say, underneath
17 the picture?
18 A "The real thing in mildness, the real thing in fine
19 tobacco taste."

20 Q Would you look at the next exhibit, please.
21 This is Exhibit Number what, Dave?
22 A Yes, sir.
23 Q Pardon?
24 A Beg your pardon?
25 Q The number of the exhibit?

827

DIRECT - TOMPKIN

1 A 17.
2 Q And what is that?
3 A It's an advertisement for Herbert Tareyton cigarettes.
4 Q Have you ever seen that ad before?
5 A Yes.
6 Q And when was that?
7 A This would have been while I was smoking Tareytons.
8 Q And does it say anything about the filter?
9 A That's the dual filter, charcoal.
10 Q Even has a picture of it's there, is that what you are
11 referring to?
12 A Yes.
13 Q The -- can you tell us -- I guess you've discussed
14 with us the fact of you are seeing ads regarding this dual
15 filter before, is that correct?
16 A Yes.
17 Q You did talk about that earlier today, is that true?
18 A Yes.
19 Q And can you tell us whether or not you saw some of
20 those ads regarding that dual filter before you began
21 smoking Herbert Tareytons?
22 A Yes, sir.
23 Q And yes sir, meaning what?
24 A I could have seen those before I started smoking
25 Herbert Tareytons.

828

DIRECT - TOMPKIN

1 Q I'm not talking about that particular language. I
2 want to go back why did you start smoking Herbert Tareytons?
3 A Because of the filter.
4 Q And what is there about that Herbert Tareytons filter?
5 A The charcoal.
6 Q And when did you learn about that charcoal filter?
7 A When I saw these ads.
8 Q And in relationship to your smoking Herbert Tareytons
9 when did you learn about the charcoal filter?
10 A It may have been before I started --
11 Q Pardon?
12 A Before I started smoking them.
13 Q I'm going to hand you what has been marked as
14 Plaintiff's Exhibit 27 and 28.
15 Would you tell us what Plaintiff's Exhibit 27
16 is, sir?
17 A That's an advertisement for Lark cigarettes.
18 Q And have you ever seen that ad before?
19 A Yes, sir.
20 Q And when was that?
21 A This one was before I started smoking them.
22 Q Smoking what, anything?
23 A Larks.
24 Q Would you show it to us, please.
25 What does the bold print say on that ad?

829

DIRECT - TOMPKIN

1 A It says, "taste the good things."

2 Q Can you do it so both you can see it and the camera
3 could see it and the jury can see it, Dave?
4 Go ahead?
5 A "Taste the good things that happen to smoke filtered
6 through Lark's charcoal granules."
7 Q And what does it show at the top of that? What is
8 that?
9 A It shows the filter being cut apart with charcoal
10 falling, the charcoal is coming out.
11 Q Okay. If you go to the next exhibit, please. And
12 this is Exhibit Number what?
13 A 28.
14 Q And have you ever seen that exhibit before?
15 A Yes, sir.
16 Q And when was that?
17 A This was -- it was either during the time I was
18 smoking or before I started smoking them.
19 Q And would you show that to us, please.
20 And again, what does it say in bold print?
21 A "Now taste the good things that happen to smoke
22 filtered through charcoal granules."
23 Q And again, does it show the picture of the charcoal
24 coming out of the filter?
25 A Yes.

830

DIRECT - TOMPKIN

1 Q Would you go to the next ad, please?
2 A This is 32 -- or 33, I beg your pardon.
3 Q And let me take that. Have you seen Exhibit 33
4 before?
5 A Yes.
6 Q Did you ever smoke L&M, very many of them?
7 A Not that I recall.
8 MR. COFER: Objection.
9 BY MR. SMITH:
10 Q And same way with Exhibit 34, is that an L&M?
11 A Yes, sir.
12 Q Have you seen that ad also?
13 A Yes, sir.
14 Q On Exhibits 33 and 34, can you tell us whether or not
15 you saw them during the period of time you smoked?
16 A No, sir.
17 Q You just know you have seen it?
18 A I've seen it.
19 Q I'm going to hand you what have been marked as
20 Plaintiff's Exhibit 2 through 6.
21 Would you tell us what Exhibit 2 is, please --
22 or withdraw that.
23 Have you ever seen Exhibit 2 before?
24 A Yes.
25 Q And when would you have seen that?

831

DIRECT - TOMPKIN

1 A I'm not sure.
2 Q Can you tell us when you would have seen it in
3 relationship to your smoking? Whether or not you saw it
4 before or after you quit smoking?
5 A This would be before.
6 Q Before you quit?
7 A Yes.
8 Q But you can't say when?
9 A No.
10 Q Would you show us that ad, please?

11 This is of what company?
12 A Old Gold.
13 Q And what is the, what do the key words say at the top
14 upper left hand corner there?
15 A "The crowning treat in smoking pleasure, now King
16 size."
17 Q Those are the largest words on that ad, are they not?
18 A Yes, sir.
19 Q Would you go to the next exhibit, please. This is
20 Exhibit Number what?
21 A Three.
22 Q Have you ever seen that exhibit before?
23 A Yes, sir.
24 Q And when would you have seen that, please?
25 A I'm not sure.

832

DIRECT - TOMPKIN

1 Q Can you give us a relationship to when you were
2 smoking; whether you saw it before, after or don't know?
3 A I don't know.
4 Q If you would go to the next exhibit, please.
5 That's Exhibit Number what?
6 A Number 4.
7 Q Have you ever seen that particular ad before?
8 A Yes, sir.
9 Q Can you tell us whether or not you saw that ad either
10 before or after you smoked? Do you know?
11 A No, sir.
12 Q The next exhibit.
13 That is Exhibit Number what?
14 A Number 5.
15 Q Have you ever seen that ad before?
16 A Yes, sir.
17 Q Can you tell us when you saw that ad, either before
18 you quit smoking in 1965 or after, or you don't know?
19 A I don't know.
20 Q The next exhibit?
21 A Exhibit 6.
22 Q Have you ever seen that particular ad before?
23 A Yes, sir.
24 Q And do you know when you saw that ad?
25 A No, sir.

833

DIRECT - TOMPKIN

1 Q And you can't tell us again if that was before or
2 after you quit smoking?
3 A No, sir.
4 Q I'm going to hand you what has been marked Plaintiff's
5 Exhibit 7, Tompkin 7.
6 For the record, all the exhibit numbers we are
7 using have the name Tompkin on them as well as the number.
8 Have you ever seen that particular ad before?
9 A Yes, sir.
10 Q And can you tell us when you saw it?
11 A No, sir.
12 Q I'm going to hand you Plaintiff's Exhibits 8, 9, 10
13 and 11.
14 Plaintiff's Exhibit 8, have you ever seen that
15 before?
16 A Yes, sir.
17 Q And can you tell us when?
18 A No, sir, I cannot.
19 Q On this series of -- withdraw that.

20 You can't tell us when you saw that particular
21 ad?
22 A No, sir.
23 Q Let's go to the next one, please.
24 That's Plaintiff's Exhibit what?
25 A Nine.

834

DIRECT - TOMPKIN

1 Q Have you seen that ad before?
2 A Yes, sir.
3 Q Can you tell us when it was in relationship to when
4 you were a smoker?
5 A I cannot.
6 Q Would you look at the next one.
7 Have you ever seen that ad before?
8 A Yes, sir.
9 Q Can you tell us when you saw it?
10 A No, sir.
11 Q Would you look at the next exhibit, please.
12 Have you ever seen that one before?
13 A Yes, sir.
14 Q Can you tell us when?
15 A No, sir.
16 Q I'm going to hand you Plaintiff's Exhibits 12 through
17 14.
18 Plaintiff's Exhibit 12, have you ever seen that
19 before?
20 A Yes, sir.
21 Q And can you tell us when?
22 A No, sir.
23 Q Plaintiff's Exhibit 13, have you ever seen that
24 before?
25 A Yes, sir.

835

DIRECT - TOMPKIN

1 Q Can you tell us when?
2 A No, sir.
3 Q And Plaintiff's Exhibit 14. Have you ever seen that
4 before?
5 A Yes, sir.
6 Q Can you tell us when?
7 A No, sir.
8 Q I want to ask you the question, while you smoked Old
9 Golds or before you smoked Old Golds, can you tell us
10 whether or not you ever saw any ads regarding Old Golds?
11 A Before I started smoking Old Golds?
12 Q Before or while you start smoking them?
13 A I can't remember.
14 Q How about Philip Morris? Did you ever see any ads
15 before or while you smoked?
16 A I had to have seen them, yes.
17 Q Is your answer you did?
18 A I would say yes.
19 Q Why do you say that?
20 A Because of the magazines I read and different
21 advertisements I saw, it would have to be available.
22 Q What magazines were you reading?
23 A Life. Basically Life.
24 Q Why did you like Life?
25 A Because of the pictures that was in it.

836

DIRECT - TOMPKIN

1 Q What ages were you when you read Life a lot?

2 A Oh, I would have to go back to maybe 8 year old.
3 Q Up until what age?
4 A Well, probably 17, 18, 19.
5 Q Was Life available in your home?
6 A Yes.
7 Q How is that?
8 A Well, my older brother, my two older brothers belonged
9 to the Scouts, I was in the Scouts and we used to collect
10 papers and magazines for the war drive. Used to store them,
11 separate them, put them in our basement, put them in the
12 garage so I had access to all magazines that were available
13 at that time.
14 Q How often did Life come out, do you recall?
15 A I was thinking weekly, but I'm not sure.
16 Q That's your best recollection?
17 A That's my best recollection, yes.
18 Q And say it came out 52 times a year, of those how many
19 were you looking at, as best you recall?
20 A During the war?
21 Q Okay. During the war?
22 A And after the war, I would say anytime we picked
23 magazines out on a drive, I looked at every one of them.
24 And I would -- probably the majority of them.
25 Q When you say you looked at them, what do you mean by

837

DIRECT - TOMPKIN

1 looking at them?
2 A Well, looked at the pictures.
3 Q Would you go through the whole magazine or just a
4 little bit of it?
5 A I would go through most of it. I would look at the
6 pictures because a lot of it was during the war, for tanks,
7 fighting, airplanes. And then there was - If there was any
8 movie stars in there I looked at them.
9 Q Dave, we have some photographs here that I would like
10 you to explain to the ladies and gentlemen of the jury,
11 please.
12 First I'm going to hand you Plaintiff's Exhibit
13 53.
14 Would you tell us what that is, please?
15 A That's a picture of my family.
16 Q Okay. And tell us who they are as we go through it,
17 if you would?
18 A This is my son-in-law, he's married to Deb my oldest
19 daughter, that's myself, that's my wife, my youngest
20 daughter Donna, Denise the middle daughter and her husband
21 Doug.
22 Q This was taken approximately when? Just give me a
23 range you are comfortable with, I don't care about being
24 absolutely precise?
25 A Oh, it had to be '91 or '90, somewhere in there.

838

DIRECT - TOMPKIN

1 Q Plaintiff's Exhibit Tompkin 52, is what?
2 A That's my youngest granddaughter, that's her birthday.
3 This is her mother, Debra, that's Sarah, and Donna and
4 that's my wife here in the background.
5 Q That was taken approximately when?
6 A I was afraid you were going to ask me that.
7 Q Would that have been in the '80's or '90's?
8 A She was, let's see, probably about 8, I would say that
9 was in the '90's, yes.
10 Q Plaintiff's Exhibit Tompkin 54, what is that, please?

11 A That's my birthday.
12 Q Do you recall the approximate year?
13 A That would be in -- no, sir, I don't. That's also in
14 the '90's.
15 Q It's in the '90's?
16 A Yes, sir.
17 Q Who is in that picture?
18 A This is my father in the background, that's my father,
19 this is my son-in-law, that's Sarah, this is Christine to
20 the back of you, and the head chopped off is my son-in-law
21 Doug, and my daughter Denise.
22 Q Tompkin 37, what is that, sir?
23 A This is a picture of my brothers and my father on his
24 90th birthday.
25 Q You have three brothers in there with you?

839

DIRECT - TOMPKIN

1 A Three brothers and one is missing, Gilbert, he's in
2 California.
3 Q How many brothers did you have?
4 A Four.
5 Q Do you have any sisters?
6 A No, sir.
7 Q Are all your brothers alive?
8 A Yes, sir.
9 Q So there are five boys?
10 A Right.
11 Q Where do you stand age-wise, in the middle, one end or
12 the other?
13 A Middle.
14 Q So you are the third?
15 A Correct.
16 Q Your father still alive?
17 A Yes, sir.
18 Q How old is your dad?
19 A He'll be 92, I believe, yeah, 92 in November. This
20 year.
21 Q Plaintiff's Exhibit Tompkin 38, Dave, what's that,
22 sir?
23 A That's a chest I made for my youngest daughter.
24 Q Approximately when did you make that or when was this
25 taken?

840

DIRECT - TOMPKIN

1 A Approximately in late '80', early '90's.
2 Q Tompkin 39, what is that, sir?
3 A That's a picture of myself at King's island.
4 Q When was that?
5 A It would have been in the '80'.
6 Q Who is this guy, Tompkin 40?
7 A That's me.
8 Q When was that?
9 A That would have to be in the '50s.
10 Q What, when you say in the '50's, approximately, can
11 you tell us approximately when in the '50's?
12 A It would be between '53 and '57.
13 Q Tompkin 41, what's that?
14 A That's a picture of me in Florida.
15 Q When was that.
16 Approximately, again?
17 A That would have been in the late '80's.
18 Q Tompkin 42, what's this?
19 A That's a picture of me also in Florida, fishing.

20 Q When would that have been?
21 A That would have been in early '92.
22 Q This is before you were diagnosed?
23 A Yes, sir.
24 Q Plaintiff's Exhibit 43, what's that, Dave?
25 A That's also a picture of me in Florida fishing.

841

DIRECT - TOMPKIN

1 Q Is this the same period as 42?
2 A No, sir.
3 Q When would this have been?
4 A It would have been in 93'.
5 Q Your family -- withdraw that.
6 Did you like to fish a lot?
7 A Yes, sir.
8 Q Do you still like the fish?
9 A Yes, sir.
10 Q How about your wife?
11 A I just got her started this year.
12 Q Any other members of your family fish?
13 A Yes, all of them.
14 Q Tompkin 44, what's that?
15 A That's a picture of me in Florida in the swimming
16 pool.
17 Q When would that have been?
18 A That would have had to have been in January, February,
19 '92.
20 Q Just a few months before you were diagnosed again?
21 A Yes.
22 Q Tompkin 45, tell us about that picture?
23 A That's a picture of me with my oldest daughter. And
24 that would have probably been somewhere around '59.
25 Q You still have a crew cut at that time, is that right?

842

DIRECT - TOMPKIN

1 A Yes, sir, excuse me. That would be about '58, '59.
2 Q Tompkin 46, what is that, sir?
3 A That's a picture of my backyard. That's a fence I put
4 down in the back and brick work I did in here.
5 Q Approximately when was this taken?
6 A Three or four years ago.
7 Q Is this the home you still live in, sir?
8 A Yes.
9 Q Tompkin 47, would you tell us what that is, please?
10 A That's a picture of my front, front of my house.
11 That's the sidewalk I put in here, and I don't remember when
12 I built that, but I put this sidewalk in and I brick
13 veneered the front of the house. That would have to be some
14 time in the late '60's or early '70's.
15 Q Do you still live in this home?
16 A Yes, sir.
17 Q Here is a tough guy here, Tompkin 48, who is that,
18 please?
19 A That's a picture of me.
20 Q How old were you?
21 A 16.
22 Q Do you know where that was taken or not?
23 A No, sir, I don't know.
24 Q Tompkin 49. Who is that, please?
25 A That's a picture of me putting that brick sidewalk in

843

DIRECT - TOMPKIN

1 that was earlier in the pictures before it's finished.

2 Q That would have been again in approximately what
3 period of time?
4 A That was probably in the '80's.
5 Q Tompkin 50. What is that?
6 A That's a picture of a house my wife and I bought in
7 southern Ohio.
8 Q And what's -- withdraw that.
9 Approximately when was this picture taken? What
10 time period, roughly?
11 A '68, '69.
12 Q And do you still own that home?
13 A No, sir.
14 Q And the significance of this picture is what?
15 A It's what it looked like before we purchased it.
16 Q Did you do some work on it?
17 A Yes, sir.
18 Q Tompkin 51 is what?
19 A That's a picture of the front porch and the deck I put
20 on and siding and new windows.
21 Q And that's, I take it that's the after picture of 50,
22 is that correct?
23 A Right.
24 Q Dave, was it your hope to -- or let me restate that,
25 please, I'll withdraw that.

844

DIRECT - TOMPKIN

1 You indicated you wanted to work until you were
2 65?
3 A Yes, sir.
4 Q And in addition to laying brick until you were 65 you
5 going to do anything else?
6 A Yes.
7 Q What was that?
8 A I was going to purchase homes in the better neighbors
9 that were in need of repair, and I was going to repair them
10 and I would sell them.
11 Q This was a goal that you had, that you wanted to do,
12 is that correct?
13 A Yes, sir.
14 Q And how did you plan on doing that and brick work and
15 achieve also your goal of earning 25 to 30,000 a year? How
16 were you going to do that?
17 A Supplement my income with laying brick.
18 Q Are you capable of doing other things with homes
19 besides brick, as shown in 51? Did you do that work that's
20 shown there?
21 A Yes, sir.
22 Q Are there any parts of work in building or remodeling
23 a house that you can't do?
24 A I tried -- I do not do electrical work, I stay away
25 from it because that's a different field.

845

DIRECT - TOMPKIN

1 Q Other than electrical work can you do everything else?
2 A Yes, sir.
3 Q Tompkin 55, what's that, sir?
4 A That's Easter. That's my youngest daughter Sarah.
5 Q Is she in the red jacket?
6 A Yes, there.
7 This is her husband Mitch and my daughter Debra.
8 Q This is approximately what time zone?
9 A It's probably in the late '80's.
10 Q Tompkin 62 is what, sir?

11 A That's a family picture of part -- my new son-in-law's
12 family and our family.
13 Q Your father in that picture?
14 A Yes, sir. He's down in the lower corner.
15 Q Over here?
16 A Yes, sir.
17 Q This was taken approximately when?
18 A Let's see, they've been married I think a year, it
19 would be '93.
20 Q Here is a little picture, Tompkin 63.
21 A Yes. That was at my niece's wedding in Chicago.
22 That's my father and myself and my wife in-between.
23 Q Your wife is right behind your dad?
24 A Yes.
25 Q This was in approximately when?

846

DIRECT - TOMPKIN

1 A It had to be in '92, '93 -- 93'.
2 Q That was after you were diagnosed?
3 A Yes.
4 Q Tompkin 56 is what?
5 A That's a picture of me sitting on a patio in a condo
6 we rented in Florida.
7 Q What time period are we in?
8 A We'd be in '93.
9 Q Tompkin 57?
10 A Yes, that's a picture of my daughter and I on a boat.
11 Well, it's a ship, I should say. And it was a cruise we
12 were going to take.
13 Q Incidentally, is your wife, is she --
14 A She was the one that took the picture.
15 Q These here, she's the one that picked these pictures
16 also. Did she have a hand in picking these pictures we have
17 here out of your albums?
18 A Yes, sir.
19 Q This would have been taken approximately when?
20 A That was in January of this year.
21 Q You are continuing to live life to its fullest to the
22 best of your ability, is that correct, sir?
23 A Yes, sir.
24 Q Tompkin 58 is what, sir?
25 A That's my 50th birthday.

847

DIRECT - TOMPKIN

1 Q That's you cutting the cake?
2 A Yes, sir.
3 Q Tompkin 59?
4 A Yes, that's me in the center, my youngest daughter
5 here, this is Denise, and these two are my nephews here.
6 Q That's taken about when?
7 A Oh, it would have to be '60's, I'm not sure, '60's,
8 '70's.
9 Q '60's are or '70's?
10 A I'm not sure, somewhere in there.
11 Q Tompkin 60, what is that, please?
12 A That's a picture of my brother Bruce and myself coming
13 in after fishing for the morning or afternoon.
14 Q Where were you?
15 A In Canada.
16 Q Whereabouts did you go?
17 A That was Tweed.
18 Q Where is that?
19 A That's northeast of Toronto.

20 Q Were any other family members there?
21 A Yes.
22 Q Who were they?
23 A There was my brother Gary, my brother Bill and my
24 father and I believe my brother Gill.
25 Q So all boys?

848

DIRECT - TOMPKIN

1 A I'm pretty ti sure all of us and dad were there at
2 that time.
3 Q And Tompkin 61?
4 A Yes.
5 Q Who is that, please?
6 A That's my wife and my oldest daughter Deb and myself.
7 Q Taken approximately when?
8 A Well, she was born in '57, so some time after '57.
9 Q When you say some time after '57, she's still pretty
10 small I guess so are we talking in the '50's?
11 A Yes.
12 Q Dave, how would you describe your family?
13 A Excellent.
14 Q The frequency with which you or -- well, with which
15 you I guess have contact of one of your members of your
16 family would be approximately what?
17 A Well, Deb, she lives in Stow, probably see her on the
18 average of maybe once a week or so. Donna, we -- she lives,
19 her and her husband live in Norwalk so we try to get up
20 there at least once a month. And Denise, they live in
21 Marion, Ohio, and we try to see them at least 4 times, five
22 times a year. But we keep in constant touch on the phone
23 every week.
24 Q How about your dad? Do you see your dad very often?
25 A Yes, sir.

849

DIRECT - TOMPKIN

1 Q Dad still live in this area?
2 A Yes, sir.
3 Q Dad's not feeling super good himself right now, I take
4 it?
5 A No, sir.
6 Q His problem is what, Dave?
7 A Cancer.
8 Q Do you know what type of cancer he has?
9 A To my knowledge, I believe it's a glandular cancer.
10 Q Have you been trying to help care for your dad?
11 A Yes, sir.
12 Q Would you tell us about that, please?
13 A Trying to get somebody to stay with him. And I go
14 over and the wife does his laundry, go over and do that. I
15 tried to mow his yard a few times, rake the leaves, take him
16 to the doctors. His garage was falling down, I rebuilt the
17 garage, got it stabilized, put a new roof on it.
18 Q When did you do that?
19 A It would have been in '92, somewhere in there, before
20 I was operated on.
21 Q You and your father, would you describe, how would you
22 describe your relationship with your father?
23 A Close.
24 Q How about your brothers? Where are they at now, the
25 four brothers?

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DIRECT - TOMPKIN

1 A Gilbert, the oldest, is in SanDiego, California. My

2 brother Bill is in Cuyahoga Falls. My brother Bruce, he's
3 in Chicago. And my brother Gary lives in Bath.
4 Q Would you tell us the things that you and your wife
5 like to do together?
6 A Well, I got her started on the fishing, she likes
7 that. And we just like to be around each other.
8 Q The type, what types of things do you do together?
9 A Go out to eat, go on vacations, go shopping.
10 Q Dave, I'm going to hand you what has been marked as
11 Tompkin 64, which is a listing of various bills.
12 Would you take a look at that, please?
13 And my question to you is, to the best of your
14 understanding, does that contain reference to at least some
15 of the bills that you have incurred as a result of your
16 lung condition, lung cancer?
17 A I would say yes, because, it looks okay.
18 I'd say, yes.
19 Q One other question I want to go back to. I don't know
20 this is on the record.
21 During the period before you smoked Chesterfield
22 and Pall Malls, did you ever see any ads in magazines or
23 elsewhere regarding those cigarettes? Putting aside what
24 the ads may have said for the moment, just did you ever see
25 ads regarding those cigarettes, to the best of your

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DIRECT - TOMPKIN

1 recollection, before you began smoking them?
2 A I would say yes.
3 Q I would like to go to the year 1992. Now during that
4 year, you've indicated you were diagnosed of suffering, that
5 you were suffering from lung cancer on June 26th, 1992?
6 A That's correct.
7 Q Up until that point in time, had you been working full
8 time, as best you recall?
9 A Yes, sir.
10 Q You had been seeing doctors to try to figure out what
11 was wrong with you, is that true?
12 A Yes, sir.
13 Q Following your diagnosis -- or withdraw that.
14 The work you did on your dad's place, was that
15 before or after June 26th, as best you recall?
16 A It would be after.
17 Q So you did that work for your dad after the diagnosis
18 was made and told to you, as best you remember?
19 A Yes, as best I can recall.
20 Q What treatment did you receive following that
21 diagnosis?
22 A Started with I had radiation and chemo.
23 Q And did either of those have an effect upon you, as
24 far as the way you felt or?
25 A The radiation.

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DIRECT - TOMPKIN

1 Q Or function?
2 A Beg your pardon.
3 Q No, excuse me, go ahead.
4 A The radiation I really didn't have too much after
5 effects from that. Other than it started to close the
6 throat area or something for swallowing, I would have
7 problems swallowing.
8 But there was, I don't remember the sequence of
9 events, but the radiation they stopped, I think it was
10 because they remarked me on something, remarked positions

11 and changed me to a different position because I had as
12 many rads as they could give me in that one direction, so I
13 think there was a pause in-between there, and it started to
14 alleviate that problem. And then I didn't really get that
15 much treatment afterwards from the radiation.

16 Chemo, it was, you can't describe it. It's
17 nausea, disorientation, nervousness, cannot concentrate. I
18 paced the house like a caged bear. I always remember the
19 bear at as kid up at the Perkins Woods and watched him pace
20 back and forth, and that's the best way I could describe my
21 pacing back and forth in the house.

22 Food I couldn't eat. I stuck with basically
23 peanut butter and jelly. Plastic, to this day I cannot
24 stand the smell of it.

25 Q What is that?

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DIRECT - TOMPKIN

1 A Plastic.

2 Q Plastic?

3 A The smell, curtain hanging. It brings back the memory
4 of curtains in the hospital, the pan I used to hold in
5 front of me.

6 Q Before you were told by Dr. Haas as to what you had,
7 and have for that matter, did you have the symptoms prior to
8 that time?

9 Were you hurting anywhere before Dr. Haas told
10 you you had lung cancer?

11 A Yes, sir.

12 Q Tell us of the pain you were having?

13 A It was in the right rib cage.

14 Q Did you, can you tell us when you started losing
15 weight?

16 A Yes, I did.

17 Q And when did you start losing weight?

18 A I really couldn't say for sure.

19 Q Are you still working full time?

20 A Yes, sir.

21 Q And can you tell us whether your condition is having
22 an impact on your work?

23 A Yes, it is.

24 Q Tell us about it, please?

25 A Can't plan too far ahead. Cause I've been told the

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DIRECT - TOMPKIN

1 cancer spread to the base of the neck on the right side and
2 I'm going to have to have chemo treatments again, maybe in
3 January. He's not sure. So, my partner wanted to bid the
4 one project, it would have been a nice job, but just
5 couldn't do it. So we have to stay with stuff that maybe
6 takes a month, two, three months, that's as far as I can
7 plan ahead.

8 Q How long would that job be that your partner wanted to
9 do?

10 A Summer to fall.

11 Q On your day-to-day activities on your job, do you
12 notice any problems with your chest or lungs or wind?

13 A Well, my breath, day before yesterday when I was
14 working I had to stop and go over and lean against my truck
15 and catch my breath, get my breath back. I can't lift the
16 weight I used to.

17 Q How about mowing grass and things of that type?

18 A No.

19 Q Did that have any effect upon you?

20 A Yes, sir.
21 Q What is that?
22 A Our front yard is about as big as this room, and as
23 soon as I mow that I have to mow that and sit on the patio.
24 Q How big is the room, your ballpark best estimate?
25 A About 40 by.

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DIRECT - TOMPKIN

1 Q How many?
2 A I mean 14 by 24, 25, 26.
3 Q Did you ever have blacking out spells or almost
4 blacking out spells?
5 A Yes, sir.
6 Q Would you tell us about that?
7 A When I first went back to work, after the operation
8 and came home, any time I bent over, I couldn't even hardly
9 get on my knees, but when I did bend down there, I would
10 have tendencies to black out, and I would have to sit down.
11 And this took, ballpark figure, six months, seven months.
12 Q Dave, I think you told me there was one plus to what
13 you are going through?
14 A Yes, sir.
15 Q What is that?
16 A I started to go back to church. And refocusing my
17 life.
18 Q Let's talk about the future for a minute.
19 Have you been told whether or not you are going
20 to have any further surgery, or they just talk about
21 chemotherapy?
22 A Surgery is out.
23 Q Have you had surgery done in the past?
24 A Yes, sir.
25 Q And that would have been approximately when?

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DIRECT - TOMPKIN

1 A In September of 1992.
2 Q And what was that?
3 A They removed a portion of my right lung. It was
4 40 percent. And they removed as much of the tumor, and I
5 suppose they took the tumor or whatever else out.
6 Q Was that an uncomfortable experience?
7 A Yes, it was.
8 Q Want to tell us a little bit about it?
9 A I had tubes in my side, it was approximately 3/8 of an
10 inch in diameter. Looked like it was a garden hose. It was
11 probably 8 to 10 inches long. It was fastened to my side
12 and was inside the rib cage. And there was a tube from
13 there ran down to a box. And the nurse used to call it my
14 suitcase. It would filter whatever it was draining out and
15 go through that. And I had a pillow you put under your arm
16 to keep this tube rigid, straight, so it doesn't move. If
17 it moved it would rub against all the raw nerve endings and
18 everything, and that was the most excruciating pain I ever
19 felt in my life.
20 Q Dave, you are working. How do you feel when you get
21 done working on a day?
22 A Tired.
23 Q Any different than you used to feel?
24 A Yes, sir.
25 Q And would you tell us, please?

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DIRECT - TOMPKIN

1 A The majority of times I have to come home, lay down to

2 lay down may be a half hour or so.
3 Q Can you tell us whether you experience any difficulty
4 in talking about your problem with other people?
5 A Yes, sir.
6 Q Tell us about that, please?
7 A If people ask me how I feel I used to tell them, like
8 try to tell them the truth, and I would say what was the
9 matter or something, they just kind of lower their eyes and
10 kind of walk away from you. If I said that I had a year to
11 live or they say, well, everybody doesn't know when they are
12 going to die. It's most people are just uncomfortable about
13 it.
14 Q How do you handle those things now when you are around
15 people when the subject brought up?
16 A It doesn't bother me. I try, I've only got a couple
17 people I can confide in.
18 Q You mentioned this year to live. Tell us about what
19 are you talking about there.
20 A Dr. Haas diagnosed I had tumors mors back in the right
21 lung in December 28th.
22 Q What year now are we talking about?
23 A That would have been last year.
24 Q '93?
25 A '93.

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DIRECT - TOMPKIN

1 Q He means tumors had returned, he told you?
2 A Yes, there is a tumor in the right lung and tumor in
3 the left lung.
4 Q What did he tell you the significance of that on your
5 life?
6 A Well, he says that surgery is out, definitely.
7 Radiation, because the right lung has a tumor in it and they
8 can't give me any more radiation on that right side, so they
9 can't take your right lung out because it's in the left.
10 And so the only alternative I have left is chemotherapy.
11 Q Did he mention to you the one year figure that you
12 just referred to a few minutes ago?
13 A He didn't want to talk about it either. I don't. So
14 I, he started out the room and I says, Dr. Haas, I would
15 like to have you come back in here. I says, because I would
16 like to know. So he come back in the room and I says, how
17 long have I got?
18 And he says, I can't say.
19 And I says, I understand that you can't say,
20 nobody knows, I says, but from past experiences what would
21 you say? And he said a year.
22 Q That was December of last year?
23 A Yes.
24 Q Dave, how do you view the future as you sit there with
25 us today?

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DIRECT - TOMPKIN

1 A Just there is none.
2 Q Does that bother you, sir?
3 A Yes, it bothers me.
4 MR. SMITH: That's all I have.
5 THE COURT: That completes the direct
6 examination.
7 We will be in recess now until 9:00 o'clock
8 tomorrow morning. Please do not discuss this case
9 among yourself nor let anyone else discuss the case
10 with you. You are excused. We'll see you at 9:00

11 o'clock tomorrow morning.
12 Counsel, please remain.
13 (The jury withdrew from the courtroom and the

14 following proceedings were conducted in open
15 court, outside the presence of the jury.)
16 THE COURT: Do the defendant's want to run the
17 cross the first thing tomorrow.
18 MR. COFER: Yes, your Honor. Unless it creates
19 a scheduling problem for Mr. Smith. Do you have a
20 problem?
21 THE COURT: That's what I wanted to discuss.
22 Tomorrow is Friday. I don't know what you've got
23 planned.
24 MR. SMITH: Sort of Dr. Day and two daughters.
25 Your Honor, we are going to try to put on Dr. Haas,

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DIRECT - TOMPKIN

1 Dr. Cross, Dr. Netzley, those two would be very short.
2 THE COURT: You don't have Sidransky coming
3 tomorrow?
4 MR. SMITH: No, sir. I can't get him back home
5 in time because of the airlines.
6 THE COURT: You talk it among yourself whether
7 you wants to run the cross first thing in the morning
8 or later?
9 MR. COFER: My view is we are happy to
10 accommodate Mr. Smith. I understand the witness
11 difficulties. You tell me what you want to do.
12 THE COURT: I don't need to know that tonight.
13 MR. COFER: That's right. I'll work that out
14 with Russ.
15 MR. SMITH: Your Honor, there is one thing he
16 might be thinking about. Dr. Feingold was in New York
17 when the tower came down. In fact, he was across the
18 street and he was helping somebody, and he was in the
19 middle of it and he got out of it, but he's not very
20 eager to get on an airplane; he hasn't been on one.
21 There is a case that is someplace else where
22 they are taking him by live video. And I spoke to him
23 last night and he wondered if, late last night -- I've
24 done it in depos but.
25 THE CLERK: We are able to do that if you

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DIRECT - TOMPKIN

1 wanted it. The only thing is it would have to take
2 place either in the lunch room of the clerk's office
3 or in Judge Polster's chambers and Judge Gwin's
4 courtroom.
5 THE COURT: Well, you discuss it among
6 yourselves and I'll try to accommodate you, and these
7 are difficult days.
8 MR. SMITH: Yes, sir.
9 THE COURT: I've got to go, I've got to be in
10 Canton by 4:00.
11 MR. McLAUGHLIN: Thank you, your Honor.
12 MR. COFER: Thank you.

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DIRECT - TOMPKIN

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C E R T I F I C A T E

We, Susan Trischan and Richard G. DelMonico,
Official Court Reporters, in and for the United
States District Court, for the Northern District
of Ohio, Eastern Division, do hereby certify
that the foregoing is a true and correct transcript
of the proceedings herein.

Susan Trischan
Official Court Reporter

Richard G. DelMonico
Official Court Reporter

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